150 U.S. 118

RECORD, CASE NO. 15173.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM NO., ~~1203~~. 538

JOHN GRAVES, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

FILED OCTOBER 17, 1892.

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a In the circuit court of the United States for the western district of Arkansas.

Pleas and proceedings before the Honorable Isaac C. Parker, judge of the district court of the United States for the western district of Arkansas, holding circuit court, in the case of United States vs. John Graves, convicted of murder.

1 UNITED STATES OF AMERICA,
Western District of Arkansas:

In the circuit court, February term, A. D. 1892.

UNITED STATES
vs.
JOHN GRAVES. } Murder.

The grand jurors of the United States of America, duly selected, empaneled, and sworn, and charged to inquire in and for the body of the western district of Arkansas aforesaid, upon their oath present:

That John Graves, a white man and not an Indian, on the 13th day of February, A. D. 1889, at the Cherokee Nation, in the Indian country, within the western district of Arkansas aforesaid, with force and arms, in and upon the body of a certain white man whose name is to the grand jurors unknown, then and there being, feloniously, willfully, and of his own malice aforethought, did make an assault; and that the said John Graves, with a certain club, which said club he the said John Graves in his hands then and there had and held, then and there feloniously, willfully, and of his malice aforethought, did strike, beat, bruise, and wound him the said certain white man, giving to him the said certain white man then and there, with the club aforesaid, in and upon the right side of the head of him the said certain white man one mortal wound of the depth of four inches and of the breadth of half an inch, of which said mortal wound he the said certain white man then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say that the said John Graves him the said certain white man, in the manner and by the means aforesaid, feloniously, willfully, and of his malice aforethought, did kill and murder, contrary to the form of the statute in such cases made and provided
2 and against the peace and dignity of the United States of America.

2nd count.

The grand jurors of the United States of America, duly selected, empaneled, sworn, and charged to inquire in and for the body of the western district of Arkansas aforesaid, upon their oath present:

That John Graves, a white man and not an Indian, on the 13th day of February, 1889, at the Cherokee Nation, in the Indian country, within the western district of Arkansas aforesaid, with force and arms, in and upon the body of a certain white man whose name is to the grand jurors unknown, then and there being, feloniously, willfully, and of his malice aforethought, did make an assault; and that the said John Graves, with certain instruments and weapons to the grand jurors unknown, which said instruments and weapons he, the said John Graves, in his hands then and there had and held, then and there feloniously, willfully, and of his malice aforethought did

beat, cut, strike, bruise, and wound him, the said certain white man, in and upon the right side of the head of him, the said certain white man, giving to him, the said certain white man, then and there, with the instruments and weapons aforesaid, in and upon the right side of the head of him, the said certain white man, one mortal wound of the depth of four inches and of the breadth of half an inch; of which said mortal wound he, the said certain white man, then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say that the said John Graves him, the said certain white man, in the manner and by the means aforesaid,
3 feloniously, willfully, and of his malice aforethought, did kill and murder, contrary to the forms of the statute in such case made and provided, and against the peace and dignity of the United States of America.

W. H. H. CLAYTON,
United States Attorney, Western District of Arkansas.

(Endorsed on back): No. 38. United States vs. John Graves. Murder. A true bill. Lewis Hawkins, foreman. Witnesses: George Waters, Vian, I. T.; Mary Waters, Vian, I. T.; James Barnes, Bragg, I. T.; C. S. Palmer, Vian, I. T.; Robt. Williams, Illinois Station, I. T.; James Smith, near Illinois Station, I. T.; D. M. Barrick, Illinois Station, I. T.; J. E. McDaniel, Webber Falls, I. T.; Aaron Herron, John Waters, Vian, I. T.; J. S. Downing, lives at Webber's Falls, I. T.; S. C. Palmer, Vian, I. T., Florence Waters, Vian, I. T.; Bill Palmer, Vian, I. T.; James Miller, Vian, I. T. Filed February 10, 1892. Stephen Wheeler, clerk. By I. M. Dodge, D. C.

4 In the circuit court of the United States for the western district of Arkansas, February term, 1892.

WEDNESDAY MORNING, 8½ o'clock, February 10th, 1892.

Court met pursuant to adjournment. Present, the Hon. Isaac C. Parker, judge of the district court of the United States for the western district of Arkansas.

Record entries.

UNITED STATES
vs.
JOHN GRAVES. } Indictment for murder, No. 38.

On this day come the United States of America, by Wm. H. H. Clayton, esq., attorney for the western district of Arkansas, and come the said defendant, in custody of the marshal and by his attorney, and having had hearing of said indictment and it being demanded of him concerning said indictment above specified and charged upon him how he would acquit himself thereof, he says he is not guilty as charged in said indictment and puts himself upon the country.

On this day, by agreement of parties, it is ordered by the court that this cause be, and the same is hereby, continued to the next term of this court and set down for trial May 11th, 1892.

TUESDAY, April 26, 1892.

Ordered by the court that the following case now pending be continued and set down for trial as follows, to wit: No. 38. John Graves. Murder. July 12, 1892.

At vacation—May term, Monday, 13, 1892.

(Caption omitted.)

5 On this day come the said defendant, by his attorney, and files his application in writing, verified upon oath, praying for witnesses in his behalf at the expense of the United States.

Whereupon it is ordered by the judge that the legal expense of procuring the testimony of C. L. Topp, Dr. L. E. Page, Geo. Nunning, Mrs. A. E. Nunning, Orie Kendrick, M. F. Butler, C. E. Morgan, Mrs. C. E. Morgan, Ed. Sweet and Dolly Cravens, in behalf of said defendant, be paid by the United States, and that a subpœna be issued for them, returnable July 12, 1892.

THURSDAY MORNING, *July* 14, 1892.

(Caption omitted.)

On this day come the said defendant, by his attorney, and files his application in writing, verified upon oath, praying for witnesses in his behalf at the expense of the United States.

Said application coming on to be heard and the court being fully advised in the premises doth allow the same. It is therefore ordered that the legal expense of procuring the testimony of Tom Woolover and Geo. McCaslin, in behalf of said defendant, be paid by the United States, and that a subpœna be issued for them, returnable forthwith.

WEDNESDAY, *July* 27, 1892.

(Caption omitted.)

On this day come the United States of America, by Wm. H. H. Clayton, esq., attorney for the western district of Arkansas, and come the said defendant in custody of the marshal, and by his attorneys, N. L. Marmon and C. J. Frederick; and it appearing from the returns of the marshal that the said defendant has been served with a duly certified copy of the indictment in this cause, and a full and complete list of the wit-

6 nesses in this cause, and that he has also been served with a full and complete list of the panel of petit jurors and alternates, as selected and drawn by the jury commissioners for the present term of this court, more than two entire days heretofore; and having heretofore had hearing of said indictment and pleaded not guilty thereto, it is, on motion of plaintiff by its attorney, ordered that a jury come to try the issue joined. Whereupon the clerk called the entire panel of the petit jury and, after challenge by both plaintiff and defendant, the following were selected for this cause, to wit:

David L. Beardon, Wm. P. Brown, James H. Burton, Columbus B. Carlton, Wm. C. Chennyworth, Robert H. Hill, George Junkin, Laton D. Reeves, Allen N. Vanhooser, John S. Taylor, Thos. L. Chambles, Henry St. Clair.

Twelve good and lawful men of the district aforesaid duly selected, empaneled, and sworn to try the issue joined and a true verdict render according to the law and the evidence, and after hearing a portion of the

evidence and there not being time to further progress in the trial of this cause, they were put in charge of a sworn bailiff of this court.

And it is further ordered by the court that said jury be kept together, and that the marshal of this district furnish meals and lodging to said jury and bailiff in charge until discharged by order of said court.

THURSDAY, *July* 28, 1892.

(Caption omitted.)

On this day come the United States of America, by Wm. H. H. Clayton, esq., attorney for the western district of Arkansas, and come the said defendant in custody of the marshal, and by his attorneys, N. L. Marmon, esq., and C. J. Frederick, esq., and now come the jury heretofore
7 empaneled for the trial of this cause, to wit: David L. Beardon, Wm. P. Brown, James H. Burton, Columbus B. Carlton, Wm. C. Chennyworth, Robert H. Hill, George Junkin, Laton D. Reeves, Allen N. Vanhooser, John S. Taylor, Thos. L. Chambles, Henry St. Clair, who took their seats in the jury box, and after hearing further evidence and there not being time to further progress in the trial of this cause, they were put in charge of a sworn bailiff of this court.

FRIDAY, *July* 29, 1892.

(Caption omitted.)

On this day come the United States of America, by Wm. H. H. Clayton, esq., attorney for the western district of Arkansas, and come the said defendant in custody of the marshal, and by his attorneys, N. L. Marmon, esq., and C. J. Frederick, esq., and now come the jury heretofore empaneled for the trial of this cause, in charge of a sworn bailiff of this court, to wit: David L. Beardon, Wm. P. Brown, James H. Burton, Columbus B. Carlton, Wm. C. Chennyworth, Robert H. Hill, George Junkin, Laton D. Reeves, Allen N. Vanhooser, John S. Taylor, Thos. L. Chambles, Henry St. Clair, who took their seats in the jury-box, and after hearing the balance of the evidence and the argument of counsel and receiving the charge of the court, retired, in charge of the sworn bailiff aforesaid, to consider of their verdict.

SATURDAY, *July* 30th, 1892.

(Caption omitted.)

On this day come the United States of America, by Wm. H. H. Clayton, esq., attorney for the western district of Arkansas, and
8 come the said defendant in custody of the marshal, and by his attorneys, N. L. Marmon, esq., and C. J. Frederick, esq.; and now come the jury heretofore empaneled for the trial of this cause, in charge of a sworn bailiff of this court, to wit: David L. Beardon, Wm. P. Brown, James H. Burton, Columbus B. Carlton, Wm. C. Chennyworth, Robert H. Hill, George Junkin, Laton D. Reeves, Allen N. Vanhooser, John S. Taylor, Thos. L. Chambles, Henry St. Clair, who returned into court the following verdict, to wit:

"We, the jury, find the defendant guilty of murder, as charged in the second count of the indictment."

(Signed) W. C. CHYNOWETH, *Foreman.*

Whereupon the jury was by the court discharged from the further consideration of the case, and the said defendant remanded to the custody of the marshal to await final sentence.

August term, Tuesday, Sept. 13, 1892.

(Caption omitted.)

On this day come the said defendant by his attorneys, and files his motion to set aside the verdict of the jury and for a new trial in this cause.

August term, Tuesday, Sept., 13, 1892.

(Caption omitted).

On this day come on to be heard the motion, heretofore filed by the defendant, to set aside the verdict of the jury and for a new trial in this cause; and the court, being well and sufficiently advosed in the premises, doth overrule said motion.

9 MONDAY, *September* 19, 1892.

(Caption omitted).

On motion of Wm. H. H. Clayton, esq., attorney for the western district of Arkansas, the said defendant, John Graves, was brought to the bar of this court in custody of the marshal of said district, and it being demanded of him what he has to or can say why the sentence of the law upon the verdict of guilty, heretofore returned against him by the jury in this cause on the 30th day of July, 1892, shall not now be pronounced against him, he says he has nothing further or other to say than he has heretofore said.

Whereupon, the premises being seen and by the court well and sufficiently understood, it is considered by the court that the said marshal of the district aforesaid, cause the said John Graves to be taken hence, and him, the said John Graves, safely and securely keep from the date hereof, until Wednesday, the 2nd day of November, A. D. 1892, and on that day and between the hours of nine o'clock in the forenoon and five o'clock in the afternoon of said day, the said marshal cause the said John Graves to be taken to some convenient place within this district, to be appointed by said marshal, and then and there, between the said hours of nine o'clock in the forenoon and five o'clock in the afternoon, on Wednesday, the said day of November, in the year of our Lord one thousand eight hundred and ninety-two, cause the said John Graves to be hanged by the neck until he is dead.

9½ In the circuit court of the United States for the western district of Arkansas, August term, 1892.

TUESDAY MORNING, 8½ o'clock, 1892.

Court met pursuant to adjournment.

Present: The Hon. Isaac C. Parker, judge of the district court of the United States for the western district of Arkansas.

UNITED STATES
JOHN GRAVES. } Indictment for murder. No. 38.

On this day come the said defendant, by his attorneys, and tenders his bill of exceptions, and asks that the same may be signed and made a part of the record in this cause, which is accordingly done.

And the defendant also files his assignment of errors and petition for writ of error to the Supreme Court of the United States, together with his petition, supported by affidavit, praying for an appeal in this cause at the expense of the United States.

10 *Bill of exceptions.*

In the circuit court of the United States for the western dist. of Ark., May term, 1892.

UNITED STATES }
vs. } Murder.
JOHN GRAVES. }

Be it remembered that on the trial of the above-entitled cause the United States, to maintain the issues on its part, produced and examined the following witnesses: Robert Williams, James Smith, J. S. Downing, D. M. Barrick, J. E. McDaniels, George Waters, Mrs. Mary Waters, James Barnes, John Waters, C. S. Palmer, Mrs. C. S. Palmer, James Miller, who testified as follows:

11 ROBERT WILLIAMS, having been duly sworn upon behalf of the Government, was examined by the district attorney, Wm. H. H. Clayton, and testified as follows to wit:

Question. Where do you live?

Answer. I live about four miles west of Illinois Station, Cherokee Nation.

Q. How far is that from Vian?

A. I suppose it is about 14 or 15 miles.

Q. How far from Braggs Station?

A. Six or seven.

Q. On which side of Greenleaf Mountain do you live?

A. I live on the west side.

Q. That is, you live on the upper side—northwest—I reckon; you live on the opposite side from Vian, do you?

A. I live, really, to the left of the mountain from Vian.

Q. Do you know this defendant, John Graves?

A. No, sir.

Q. He is charged in this indictment with the murder of an unknown man, in 1889, up there not far from where you live; please state if you found the body of a man and, if so, all the circumstances under which you found it?

A. On one Sunday evening, about the last of April or the first days of May—I do not recollect which—I went to hunt some cows near the Fort Gibson road, from where I was living then, and I got a mile and a half to the left of the road, up on the second little mountain after I left home, and I noticed some cattle bunched up and I rode out to where they were.

Q. When this occurred was on one Sunday evening in 1889 when you were out hunting cattle?

12 A. Yes, sir; the latter part of April or the first days of May.

Q. What time in the day was it you were hunting cattle?

A. It was four o'clock when I left home in the evening.

Q. Now, then, go on and state what you saw and all about it.

A. I went this road a mile and a half beyond where I was living at that time.

Q. What road?

A. The Ft. Gibson road, and off to the left of the road about 150 yards I saw some cattle.

Q. Which way were you going?

A. I was going nearly in a north direction from where I lived; a little west of north.

Q. Do you know where the Sulphur Springs branch crosses the road?

A. Yes, sir.

Q. How far from there?

A. About a quarter of a mile the other side.

Q. Then you were to the left of the road going north; that would be west of the road?

A. Yes, sir.

Q. What did you do?

A. I was in the road when I saw the cattle and I rode out to where they were. The horse I was riding on scared at something and I flashed my eyes down and I saw the skeleton in ahead of my horse. I didn't think at the instant what it was, but he stepped over to one side and I looked down under me and there was the skull lying there with the teeth up, and I knew what it was, and there was a darky rode with me from home to where I turned out of the road, and I hollored at him—he was out a couple of hundred yards from me——

Q. What was his name?

A. Faddo. He could not talk good English. He came down there and he said, "What do you want?" and I said, "Look over there;
13 what do you think of that?" He stood there about a minute on his horse and he said, "If I had known what you wanted I would not have come," and he rode off. Neither one of us got down. I went home and went about a mile over to Frank Hubbard's and got him and Bob Crawford and we went back there, and it was nearly sundown then. We looked at the bones and the next morning I went and got four men, besides us three, and we buried the man.

Q. State now all you saw there; the condition of the body. You said there was a skeleton; was there any flesh on it?

A. No, sir; not to say any flesh. The hide was on the body or bones, but the hogs had torn a good many of the bones apart. He had been put at the root of a tree. The tree had been blowed down seven or eight years, I suppose. All the sap had run off the log where it had blowed up, and the roots had turned up with it, leaving a little sink in the ground, and in that little sink he had been placed, and brush and logs had been throwed over him, from all the appearances and looks there, and we found some peices of skull there, showing that the body had been drug out from under that; the brush and logs were scattered, and the body was drug out from under that, and was laying three or four feet from that hole. The skull was laying 10 or 12 feet from the hole.

Q. Did you find any parts of the body in the hole?

A. Nothing; only some peices of the skull.

Q. You speak of brush and logs——

A. It was post-oak brush. There had been a tree cut down in about 10 steps of the place and cut up in sticks about that long (indicating), and some of them looked like it had been piled on him, and the fine brush had been put on; a good part of it was over the hole, and had been scorched a little; from all appearances the brush had been set afire.

14 Q. State how big a place you found there; that is, that had been burned of the wood.

A. There was a place about as big as this room, I suppose; an old burn it looked like, but since that time there was a fresh burn that was clean all around——

Q. I am speaking of the wood there.

A. The wood was n't scorched to say scorched. The little twigs were burned off, and the pants on his legs were burned part, I think.

Q. Could you tell whether it had been fired from the bottom or top?

A. No, sir; the brush was scattered so you could not tell anything about it.

Q. In what condition did you find the skull?

A. It was in two *peices*; two large *peices* and several small *peices*, six or seven of them. It was busted all up on each side; the back part was sound and the front was sound.

Q. What did you do with the body?

A. I took a box from my house and put it in that box, and dug a hole and buried it right there.

Q. What clothing was on it?

A. There was a knit blouse that was either on or about the body; I could not say; I could not say whether the coat and blouse was on the body or not, but I think one of the arms was in the coat and blouse. That was the clothing that he had on his body.

Q. Did he have any pants?

A. Yes, sir; they were on his legs, strapped down on one leg like; there was one boot and leg off up to here (indicating), and that part of the pants was off of that leg, and the boot was on the other leg.

Q. What did you do with the boots and other things you found there—the clothing?

A. We put them all in the box.

15 Q. Look at the boots I now hand you and see if they are the boots.

A. Yes, sir; these are the boots.

Q. Here is the skull; the teeth, or a good many of them, have dropped out of it since it has been here; do you know what became of the skull?

A. A day or two afterwards, maybe it was three or four days, Cornelious Boudinot, and his father, Doctor Campbell, and this man Downing, came past my house in a hack, with a darky driving them, and they come there and got me and took up the skull and boots and what clothing there was, and taken them to Illinois station.

See if the skull I now hand you is the skull.

A. Yes, sir. This piece (referring to lower part of skull) was yet to the body; it had not broken loose from the body.

Q. Can you remember how the teeth were when you saw them; how many teeth were in it?

A. Yes, sir; all the teeth was here with the exception of this one, and these two. These two were broken off, and that one on the left side was gone.

Q. You remember that, do you—that that tooth was out on the left side?

A. Yes, sir.

Q. These two teeth broken off and all the other teeth in?

A. Yes, sir; they were all good sound teeth with the exception of these three.

Q. Were these cracks in the skull then, as now?

A. It had not sprung apart quite so bad. There was a crack around in front on the side, here [indicating], and there was another place around in the temple.

Q. You had never seen the defendant up to that time?

A. No, sir.

16 Q. You didn't know, of course, whose body it was?

A. No, sir.

Q. Now, then, state whether you saw any other signs around there other than those you have mentioned; did you find any hat there?

A. No, sir.

The COURT. Where were the boots?

The DISTRICT ATTORNEY. He has testified that one leg was off with the boot on it, and the other leg was still on with the boot on it. (To the witness.) Did you find any other clothing there?

A. There was some pieces of shirt, two shirts. There was one like this I have got on, same kind of cloth, the undershirt was, and he had on an wo'llen overshirt with blue and green checks, I think, nearly as broad as my finger running across this way.

Q. Did you find any other things lying around there; did you find a coat?

A. Yes, sir; I found a coat laying there. Some one had taken it and laid it across a log right in about 4 feet of where the body had laid. It had never been knocked off the log or anything.

Q. How far was that log from the hole in which the body had been put?

A. About 4 or 5 feet; I could not tell exactly.

Q. What kind of a log was it?

A. I think that was a red oak.

Q. That was not the log of the tree that had been cut down?

A. No, sir.

Q. What kind of a tree was that that had been cut down, cut into small peices there over this hole?

A. A post-oak tree.

Q. How large a tree?

A. The tree that had been cut down there had not been used; no logs cut off of it. The brush off of the top had been cut off, pieces as large as your finger, maybe larger or smaller, all the top twigs cut off, and

17 they were laid over it or around it.

Q. Where did the larger pieces come from?

A. Close to where the tree was cut down there had been an old dead log cut up.

Q. About how large?

A. About 5 or 6 inches through, or 6 or 7, as well as I recollect; there has been one or two sticks cut off of the one that was cut down; it wasn't entirely cut up, I know.

Q. What time in the day was that?

A. It was after 4:00 o'clock when I found him.

Q. After burying these things you say you went back and took them up; how long was that after you buried them?

A. It was the same week.

Q. Who was with you?

A. Cornelious Boudinot and his father and Dr. Campbell and this man Downing.

Q. Downing is here, is he not?

A. Yes, sir.

Q. What did they do with the things after they dug them up?

A. They took them to Illinois Station to McDaneil's hotel—I suppose they took them there; that is where they said they were going to take them.

Q. You didn't go with them?

A. No, sir.

Q. Do you know who brought these things here?

A. McDaniel brought the boots and Barrick brought the skull.

Q. You think that is about a quarter of a mile from where the Sulphur Springs branch crosses the road?

A. Yes, sir.

Q. How far from the road?

A. About 150 yards.

Q. I will ask you if you discovered anything else; any tracks or anything of that kind?

A. There was wagon tracks.

Q. Explain that.

A. They drove out to the left of the road, and drove clear around where the body had been thrown, and in three or four feet of
18 where the body had been thrown out, and around and crossed the tracks right close the big road, and went on west or northwest.

Q. What sort of a wagon track was that?

A. It was an old wagon.

Q. How could you tell that?

A. It was a narrow track and a round track; didn't make a square track like a new tire.

Q. Was it a narrow track or a wide track?

A. Tolerable narrow.

Q. Was it a track made by an ordinary wagon, such as you have, or a smaller vehicle?

A. It was smaller than the average, it looked like.

Q. Was it a new or old one?

A. I supposed it being rounding that it was old. It didn't make a square place.

Q. The tracks you say went out and came around to this place where the body was found to this tree—made a loop like—and then went in this direction (indicating on diagram)?

A. Yes, sir.

Q. How close to that hole in which the body had lain was it that this track went?

A. About 4 feet, or something like that.

Q. Were there any other tracks that you discovered around there?

A. No, sir; nothing only horse tracks that was pulling the wagon.

Q. How many of those were they?

A. Two.

Q. The same size?

A. No, sir.

Q. One smaller than the other?

A. Yes, sir; about a number's difference in the shoes.

Q. This was in the Greenleaf mountains, was it?

A. Yes, sir.

Q. How close was the nearest house to the place where you found this body?

A. I suppose my house at that time was the closest.

Q. How close was that?

A. Mile and a half.

19 Q. Did you live in the mountain or at the foot of the mountain?

A. Foot of the mountain.

Q. On what side?

A. Right where you start up the mountain.

Q. On the side towards Vian?

A. Yes, sir; I don't know of any one at that time that was living any closer.

Q. Were there any farms up on the mountain at that time?

A. No, sir; not then.

Q. Were there any farms along this Sulphur Springs branch?

A. No, sir.

Q. What kind of a place was it in there where he was put?

A. It was open woods.

Q. How was it where the stream crosses the road?

A. Right where it crosses the road is a very nice place to camp. It is a level place after you get down the mountain for a quarter or half an acre; nice little place of water that lasts about all the year, and it is a nice place to camp. On the hill up and down the branch from there it is tolerable thickety.

Q. The whole mountain is covered with wood, I suppose?

A. Yes, sir; large trees; no undergrowth to amount to anything.

Q. Did you notice his hair?

A. Yes, sir; there was a piece of his hair got out of this hole where his head had been laying.

Q. What color was it?

A. It was about the color of mine; maybe a little bit lighter.

Q. Then he had light hair, as yours is a little light?

A. Yes, sir.

Q. You say you got some bones of the skull down in the hole; do you remember what you got out?

A. Little thin slivers or pieces, where they had been broken off;
20 there was five or six little slivers we put in the box that were not brought here.

Q. Was the body entirely dry—this skin you found?

A. No, sir; it wasn't dry; it was wet.

Q. Was there any smell about it?

A. Yes, sir; it smelt pretty bad.

Q. That brown coat you speak of; what kind of a coat was that? Describe it; the one that was on his body.

A. It was what I would call brown worsted goods; it was all wool, twill—I can not describe it exactly. That is as near as I can describe it.

Q. He had on a knit blouse?

A. Yes, sir; it was a knit blouse with red stitching around it, and there was a stripe of pale red or dark white on the inside of the stitching.

Q. Did he have any overalls on?

A. Yes, sir.

Q. What kind were they?

A. They were a gray twilled overall.

Q. What were the pants?

A. They were a gray cotton jeans; they were a grayish color; something like these I have got on, only a little lighter.

Q. Could you tell anything by looking at the skull as to whether there were any marks or bloodshot places on it at that time?

A. Yes, sir; it was very badly bloodshot.

Q. At what place?

A. The front part; from here down to here (indicating on top of head).

Q. What kind of a coat was that you found on the log?

A. It was a dark-colored coat; dim stripes like, as wide as my finger, running both ways on it.

Q. Frock or sack?

A. Sack coat.

Q. What was the other brown knit coat?

A. It was torn up so you could not tell anything about it.

21 Q. Did you find any handkerchief?

A. Yes, sir; there was a red handkerchief, a cotton one, in one pocket; I have forgotten whether it was in the blouse or coat pocket.

Q. Did you find anything else?

A. A pair of suspenders.

Q. Any money?

A. No, sir.

Cross-examination:

Mr. MARMON. How long had you lived up there?

A. 9 years in November.

Q. You are pretty well acquainted with the nature of the soil up there, are you not?

A. Yes, sir.

Q. Up and down that mountain, about the place where this body was found, what was the character of the soil?

A. It was a light soil on the mountain; on the level place the soil was very thin.

Q. Sort of sandy soil, was it not?

A. Yes, sir; black, sandy soil; thin, sandy clay under the soil.

Q. Had there been any rain in that section of the country, say from about the 9th or 10th of February or 13th of February, up until March, April, or May?

A. Yes, sir; there had been rain.

Q. If a wagon had carried this man there, say the 13th of February, would the tracks have remained there so you could have told what they were?

A. Yes, sir.

Q. The rain would not have washed them out on the sandy soil?

A. No, sir; it was soddy there; good grass, the wagon and horses going through the sod. When it is wet there you can ride along on these mountains and your horse will bog down so that a heap of times you will have to get off of him.

Q. I thought you said it was a thin soil there, light?

22 A. That is what I mean; I don't know what you mean by soil unless you mean the soil that is on top of the ground and supports the products.

Q. What is under it?

A. A sandy clay.

Q. Was it wet along about the 13th of February?

A. I don't recollect whether it was or not.

Q. If it had been wet the horses would have mired down?

A. If it had been extremely wet they would.

Q. If it had not been wet when the rain came the rain would have washed out the signs of the wagon and horse tracks?

A. No, sir; there is tracks there that I can show you that have been made a year where they are cut through the sod; they will stay there a year, holes in the ground.

Q. You can not tell whether they are horse tracks or holes punched with a club?

A. I can't that long; I can tell for some considerable time.

Q. Do you think you can tell three months afterwards?

A. Yes, sir; where it hadn't cut too deep.

Q. Would you be willing to swear you could tell horse tracks or wagon tracks back three months if it had passed over that ground when there had been a rain, and dry weather intervening between the time the track was made and the time you saw the impression?

A. I would not swear positively to a wagon track, but you take a horse track where the shoes are plain and do not cut too deep, and then I can be safe in swearing.

Q. Three months after the track was made?

A. Yes, sir.

Q. At the time you discovered this body had there been any burning off of the prairie or woods there?

A. There was a place had been burned off about as large as this

23 room, maybe a little larger, and from that on around it was a fresh burn; it had not been burned off over three weeks, I would not suppose.

Q. Can you tell the difference in three weeks' burn and four weeks' burn?

A. I can in five or six weeks' burn; when the leaves are falling off, they would fall on the old burn, and there would be more there than on the new.

Q. You saw no part of the body there in the hole except the *peices* of the skull?

A. Yes, sir.

Q. They had been scattered around, pulled around by the hogs. The body was badly torn up?

A. Yes, sir; considerable torn up.

Q. You can not tell what put that head in the hole; whether it was dragged there by the hogs or how?

A. I suppose it had been dragged there by the hogs.

Q. You are swearing now, and a man's life is involved; I want to know what you know about it on your oath. Could you tell whether these *peices* of skull were thrown in there by somebody or by the hogs, dragged in there by the hogs?

A. They hadn't been dragged in there by the hogs.

Q. You swear that?

A. Yes, sir.

Q. How do you know?

A. Because they were under them leaves that blowed in there, and down in a sunk place in the mud; it was a little wet in there, and we looked in there and it smelt very bad; we found a *peice* of the skull and some hair right there.

Q. Had the other parts of the body been dragged out by the hogs?

A. I suppose so.

Q. I am not asking you what you suppose; do you swear that?

A. I can not swear they did.

Q. You swear that the hogs didn't put the *peices* of skull in
24 there, but you would not swear they did drag the other *peices* of body out?

A. There was something *drug* it out.

Q. Can you swear it was ever in there at all except the little *peices* of the skull you found in there?

A. I think I can and be safe in it.

Q. Can you give me a reason why you can do that and be safe in doing it?

A. Because the prints of the man was there under the leaves where his head had laid; we got some hair and small *peices* of the skull, and the length of him was there, and the print of where his boots had come to.

Q. Did you all tramp around in there before you found the *peices* of the skull?

A. Around the edge of the place we did some.

Q. How did you happen to rake the leaves off?

A. We thought that was where he had been.

Q. What did you rake the leaves off with?

A. With the hands—very carefully.

Q. You didn't touch the soil at all?

A. No, sir; no more than we could possible help.

Q. You had to get down there with your shoes on?

A. No, sir; it wasn't so deep as all that, the hole wasn't.

Q. Wasn't you tramping around about the place there?

A. Yes, sir.

Q. You certainly made some impressions with your feet?

A. No, sir; I wasn't in that place. The place wasn't any longer than a man and not very wide or deep.

Q. How did you know exactly where to rake the leaves off about where the man was laying?

A. Because of the appearance showing that he had been dragged out of there.

25 Q. How did you know exactly where to take the leaves off to find this place; it seems that you knew exactly where to go, and exactly where to rake the leaves off, to see where his head was and where his feet were; did you know he was there?

A. No, sir.

Q. How is it you just happened to go there where that man had lain, and you just happened to rake the leaves off——

The DISTRICT ATTORNEY. He did not say he "just happened."

Mr. MARMON (of counsel for defendant). How did it happen?

A. We thought he had been laying there, and we picked the leaves out with our hands. The ground was hard where we was; been packed by the hogs or buzzards, whatever it was, and we stood there, or squatted and picked the leaves out.

Q. The hogs or buzzards had tramped around—I reckon the hogs stood on the edge and pulled him out by the seat of the breeches; didn't make any impression in that hole?

A. I didn't see any hog tracks in that hole.

Q. They stood on the outside and pulled him out by the breeches—yanked him out?

A. I reckon they did.

Q. They tramped the ground down there so you could not make any impression, the hogs or buzzards one?

A. Yes, sir.

Q. Who else did you say was with you at that time, at the time you found this place there, this impression?

A. There was Frank Hubbard, Bob Crawford and Jim Smith.

Q. Who is here of them?

A. Jim Smith is here.

Q. Was Tom Reeves along?

A. I don't know anything about him.

Q. How deep was that hole?

A. In the deepest place it was about 15 inches deep.

Q. Deeper in the middle than it was at each side, a place where

26 a tree had been blown up?

A. Yes, sir; and took the roots with it; just turned the clay out with the roots.

Q. How long had that tree been blown down?

A. Four or five years, something like that.

Q. Was there water standing in the hole?

A. There wasn't to say any water; it was wet down in there, moist.

Q. How near was this hole to the public road?
A. About 150 yards.
Q. Open woods, I believe you say?
A. Yes, sir.
Q. Anybody could see very plainly from the road to that place?
A. Yes, sir.
Q. You said something about the tire on the wheel of the vehicle that you supposed carried this body out there. If the tire is old it would naturally make a smaller track than a new one?
A. Yes, sir.
Q. What was the size of these tracks, about the size of an ordinary second hand two horse wagon?
A. I believe it was a little smaller. The track it might be was something near that width (indicating on finger about an inch).
Q. Where the impression is made in the ground by a wagon tire, especially a rounding one, wouldn't the hole be deeper in the center than any where else?
A. Yes, sir; where a rounding wagon tire runs it would be deeper in the center.
Q. If it should rain it would naturally fill up, would it not?
A. I suppose it would.
Q. Especially in sandy soil?
A. But out where it cut in it would be in that deep (measuring on finger).

27 Q. How far from the body was this spring where you say a great many people camped, this Sulphur Springs branch?
A. About a quarter of a mile.
Q. A great many people did stop there?
A. Yes, sir; used to be a great many people came there; general camping place; the road was travelled pretty extensively them days, it is about played out now.

Re-direct examination by the DISTRICT ATTORNEY:

Q. Is that the road you take to go to Oklahoma?
A. Yes, sir; I think it is. There was a heap of people going on that road to Oklahoma, and to the new railroad works.

28 JAMES SMITH, having been duly sworn upon behalf of the Government, was examined by the district attorney, through Interpreter Walkingstick, and testified as follows, to wit:

Question. Ask him if he is a Cherokee Indian?
Answer. Yes, sir.
Q. Ask him if he knows this defendant here?
A. No, sir.
Q. Ask him if he saw the dead body found up there in 1889 in the Greenleaf Mountains?
A. Yes, sir; he says he saw it.
Q. When did he see it, and how come him to see it?
A. He says Bob Williams came to his house, and he says he wasn't at home when he came there, and he says when he got back his wife told him that Williams had been there; that he had come after him.
Q. Had he left word that the body was found?

A. Yes, sir; he says Williams had told his wife that. He says he started right at once.

Q. Where did he go?

A. He says to this place where this body was found.

Q. Where was that?

A. He says it was up on the mountain there from Sulphur Springs.

Q. Greenleaf Mountain?

A. Yes, sir.

Q. What did he find?

A. He found a skeleton.

Q. Tell him to describe the whole thing.

A. He says there was some bones there and a coat.

Q. Where was the coat?

A. He says it was laying on a log, just a little distance from where the bones were.

Q. How far?

A. Somewheres about 5 steps, or maybe not quite so far.

29 Q. Tell him to describe the place, and all that he saw there, all the signs, and everything that he saw about that body.

A. He says there was a wagon track there.

Q. Tell him to describe that.

A. A narrow track, he says. He says he thought it was the track of a buggy or small wagon.

Q. Tell him to first explain how that track came, from what direction it came, where it went, and how close to the body it came, and all about it.

A. He says this dead body was on this side of the wagon track. He says the wagon track turned out from the road, he says, and circled around this way.

Q. Had gone out from the road, circled around it, and had gone back into the road again?

A. Yes, sir; it had gone back into the road.

Q. Could he tell which way the wagon was going when it left the road, and when it went back which way it went?

A. He says about northwest. The wagon was going northwest when it left the road and circled around.

Q. Ask him if when it came back into the road it went on northwest?

A. Yes, sir.

Q. How far was the body laying from the road?

A. He says it was about 100 yards, maybe a little over.

Q. On which side, east or west side of the road?

A. On the west side.

Q. Tell him to describe the place where the body was found, and all about that. If there is any holes there at the place where the body was found; tell him to tell all about that.

A. He said there had been a fire there, and great big chunks about that size laying around there, and that is about all that he saw, only

30 horse tracks, and he says one was larger than the other.

Q. There were two horse tracks, were there?

A. Yes, sir.

Q. Ask him if he noticed any hole there, or any place where a tree had blown up?

A. Yes, sir; where a tree had been blown up, and the roots blown up and made a hole in the ground.

Q. How far was the body from that hole?

A. He says just a little piece from this hole.

Q. Ask him if any part of it was found in the hole.

A. Yes, sir; hair was there in the hole.

Q. Was there any part of the skull that he observed?

A. Yes, sir; a little piece of the skull was in there.

Q. Ask him if he saw any other indications of the body having been in the hole except the hair and pieces of skull?

A. No, sir; he says he never noticed anything else.

Q. Does he remember when it was that he found this body there?

A. He says it has been three years ago.

Q. What month was it in?

A. He says it was about the first of May.

Q. Ask him if he observed or noticed the skull when it was found?

A. Yes, sir.

Q. Was it hole or broken?

A. It was broken.

Q. Would he know the skull if he would see it?

A. Yes, sir.

(Witness is here shown skull heretofore shown to jury, and identifies it as being the same skull heretofore referred to by him.)

Q. Ask him if these cracked places on the left side and the top of the skull were there at that time.

A. Yes, sir.

Q. Ask him if that crack here, running from the temple across the front part of the skull, here, nearly over the nose, was in it?

A. Yes, sir.

31 Q. Ask him if he can tell how the teeth were in the upper jaw?

A. He says one of the teeth were gone, one of the front teeth, and there was two broken off.

Q. Which one was it that was gone, on the left or right side?

A. On the left side.

Q. The others were all in then, were they?

A. Yes, sir.

Q. The skull was in this condition then when he found it, was it?

A. Yes, sir.

Q. What did they do with the things they found there?

A. He says they buried the bones there.

Q. Was he there when they were dug up the next day?

A. No, sir; he was there the next day after they were dug up.

Q. What color was the hair he saw there?

A. It was some about the color of his own hair, he says.

Q. Light hair?

A. Yes, sir.

Q. Did he observe the kind of clothing that the man had on?

A. He says that the coat was of a dark color, little white spots on it.

Q. Was it a blouse, or what kind of a coat was it?

A. It was a blouse.

Q. Ask him if he saw anything of a knit coat there.

A. He says he never noticed.

Q. He wasn't there when the clothing was taken over to Mr. McDaniels, was he?

A. No, sir.

Cross-examination waived.

32 J. S. DOWNING, having been duly sworn upon behalf of the Government, was examined by the district attorney and testified as follows, to wit:

Question. Where do you live?

Answer. Webbers Falls.

Q. Where did you live in 1889?

A. I was at Webbers Falls.

Q. Do you know this defendant?

A. No, sir.

Q. Were you before the commissioner?

A. No, sir.

Q. How far do you live from Greenleaf Mountain?

A. About 5, 6, or 7 miles from Webbers Falls.

Q. Do you know where the place is that the body was found up there on Greenleaf Mountain near the place where the Sulphur Springs Branch crosses the road?

A. Yes, sir.

Q. Please state if you were at that place.

A. Yes, sir.

Q. When?

A. It was sometime in May, I think.

Q. What year?

A. It was in 1889.

Q. What was your business there?

A. We understood there had been a man found there, and there was Cornelious Boudinot, William Boudinot, Dr. Campbell, and myself got a darkey, Mat Scott, and went up there in a wagon.

Q. Was Robert Williams with you?

A. Yes, sir; we went to his house and got him to go with us to show us the place.

Q. When you got there, please state whether you dug up the body or not?

A. Scott dug up the body while we were there.

Q. What did you find?

A. We found the remains there of a human being.

Q. Any clothing?

A. Yes, sir; there was some clothing there.

33 Q. Any boots?

A. Yes, sir.

Q. What did you do with the boots and clothing?

A. The first thing we done was to put them all together in a line to see how large a man he was, to see if we could tell anything about it.

Q. What sized man was it? Large or small?

A. I would say that he was a large man.

Q. Go ahead?

A. We looked around there, and we noticed there was a log burned in two; the weather was wet, and the ground was wet, soft, and we noticed where a wagon came in there.

Q. How was that?

A. That it started up on the Fort Gibson road going north, and had turned around on the left hand side of the road where they had stopped where the log was burned in two.

Q. Had stopped there?

A. Yes, sir; I suppose they had stopped.

Q. How could you tell they had stopped? State what you saw to indicate that.

A. There was some cans there been opened, and we supposed they had stopped there; that was the only indication that would go to show that, and the log being burned there. The track came around across and went right on.

Q. Where was this place where the cans were?

A. It was right there within ten feet.

Q. Go ahead?

A. The track was an old track—made by an old wagon tire; it did not cut square—made a rounding track.

Q. Which way did it go?

A. It made a circle going towards Fort Gibson, crossed in on the left, and came in and went back on the Gibson road.

Q. What did you do with the things you dug up?

A. Put them in the wagon. We put in the boots and an old pair of overalls, I believe, and the pants; I don't know about the pants,
34 but anyway the old pair of overalls and the skull.

Q. Was there any other clothing put in?

A. No, sir; only a jacket.

Q. I am asking you for all you took away from there. Are these the boots (exhibiting a pair of old boots)?

A. They look like the same boots.

Q. Did you cut the boots off?

A. No, sir; there was one of them that was cut down there by a young fellow at the hotel; the feet were already in the boots, and he cut one boot and took the foot out; the other one was whole; I don't know who cut that.

Q. What did you do with these things?

A. We took them down to McDaniels' hotel.

Q. At what place?

A. Illinois station.

Q. Do you think you would know the skull if you would see it, or would you not?

A. I don't know whether I would or not.

Q. Look at this skull and see if you recognize it. You took the skull down there, didn't you?

A. Yes, sir.

Q. See if this is it?

A. Yes, sir; I believe that is the skull.

Q. You took it down to McDaniels' and left it there?

A. Yes, sir.
Q. How far is Illinois Station from Vian?
A. It is 10 or 12 miles, I think.
Q. Were you before the grand jury?
A. No, sir.
Q. Did you know the name of the man you found there?
A. No, sir.

Cross-examination waived.

35 ROBERT WILLIAMS, having been recalled by the Government, was examined by the district attorney, and testified as follows, to wit:

Q. Were you before the grand jury in this case?
A. Yes, sir.
Q. Did you know the name of that man whose body you found?
A. No, sir.
Q. Were you asked the question before the grand jury if you knew who it was?
A. Yes, sir.
Q. Did you tell them you didn't know who it was?
A. Yes, sir.

Cross-examination:

Mr. FREDERICK. Do you know?
A. No, sir.
Q. Did you know who was killed up there?
A. No, sir.
Q. Did you know of anybody being killed up there, and finding the skeleton there, except this?
A. No, sir.
Q. Was this corpse you found the corpse of a large or small man?
A. It looked like a tolerable large man?
Q. Where are the other bones—the bones of the leg?
A. They are not here; they are in the box.
Q. You didn't bring them down here?
A. No, sir.
Q. You found no flesh on the body?
A. No, sir; not to say flesh; just hide.
Q. You don't know whether it was a white man or an Indian?
A. He was light complected.
Q. I thought you said there was no skin?
A. The hair was light.
36 Q. You don't know what complexion he was?
A. There was enough on him to tell——
Q. There was not enough to tell whether he was a white man or a black man?
A. No, sir.
Q. Or an Indian.

Re-direct examination.

By the DISTRICT ATTORNEY. Did he have the hair of a white man or a black man?
A. White man.

Q. Then there was something to tell it by?
A. Yes, sir.

Re-cross examination.

By Mr. FREDERICK. How much hair was there?
A. About as big as my finger.
Q. Where was that?
A. In that hole there. Jim Smith brought some of his hair to the commissioner's office, and Boudinots took some of his hair. I don't know what they done with it.

37 JIM SMITH, having been recalled upon behalf of the Government, was examined through interpreter Walkin-stick by the district attorney, and testified as follows, to wit:

Q. Ask him if he knew the name of this man that he found up there?
A. No, sir.
Q. Ask him if he was asked before the grand jury if he knew the man?
A. Yes, sir. He says they asked him the question.
Q. Did he tell them that he did not know it?
A. Yes, sir.

Cross-examination.

By Mr. FREDERICK. Ask him if there was any flesh or skin on the dead body of the man?
A. Yes, sir; there was no flesh, just the skin up along here (referring to abdomen) dried skin.
Q. Ask him if he could tell whether it was a white man or an Indian?
A. He says he could not say whether he was a white man or Indian; all he could see was just the skin along here; it looked like it was red, he said.
Q. Dried skin?
A. Yes, sir.
Q. Ask him if it was a large man or a small man?
A. Just a medium size man.
Q. He didn't see the body altogether, just saw pieces of it, didn't he?
A. Yes, sir; just saw the parts scattered around.
Q. Didn't see anybody put the pieces together to see what sort of a man he was, what size?
A. No, sir.

38 D. N. BARRICK, having been duly sworn upon behalf of the Government, was examined by the district attorney and testified as follows, to wit:

Q. Look at this skull I now hand you and see if you recognize it?
A. Yes sir; I think that is the same skull.
Q. Where did you first see that skull?
A. The first time I saw that was up at Illinois Station.
Q. At whose place?
A. At McDaniels' Hotel.
Q. Did you get it from there, and what did you do with it?

A. I got it out of the box at the hotel and took it in the post-office and washed it up and put it in a box and took care of it, and then I brought it down before the commissioner.

Q. This is the skull you brought here from McDaniels' hotel?

A. Yes, sir.

Q. Did you see the clothing?

A. Yes, sir; but I didn't pay any attention to it.

Q. Do you know whose skull this is?

A. No, sir; I do not.

Q. Do you know the man who was said to have been killed in this case?

A. No, sir.

Q. Did you ever learn his name?

A. No, sir.

Q. That is all you know about it; that you brought this skull here from McDaniel's hotel?

A. Yes, sir.

Cross-examination waived.

39 J. E. McDANIELS, having been duly sworn upon behalf of the Government, was examined by the district attorney and testified as follows, to wit:

Q. Where do you live?

A. At Webbers Falls.

Q. Where did you live in 1889?

A. Webbers Falls.

Q. Did you keep a hotel there?

A. Yes, sir.

Q. Please state if you ever saw this skull before. And these boots.

A. That is the property that was fetched to my house.

Q. Who brought it there, if you remember?

A. A man named Cornelious Boudinot and his father, Dr. Campbell, and Mr. Downing, and a driver sent out with them named Holt.

Q. They went out from your place?

A. Yes, sir.

Q. Did you know where they were going?

A. Yes, sir.

Q. Where?

A. They said they were going to investigate to see if they could find anything in regard to this dead man that had been found there in the mountain.

Q. When they returned please state if they brought these things to your house.

A. Yes, sir; they left them at the house at Illinois Station.

Q. Do you know what became of these things that was left there?

A. I took care of them; had them all put in a box there. Mr. Barricks was keeping the post-office there, and he took the head to the post-office.

Q. Do you know who brought the boots here?

A. I brought them here myself.

Q. Are the boots I now hand you the boots that were turned
40 over to you?

A. Yes, sir.

Q. What became of the clothing?

A. They fetched some of the clothing there, and they were put in a little box together, and they were so dilapidated laying there, and the stench of them was so bad that a long time afterwards the girls burned them.

Q. You mean your daughters?

A. Yes, sir.

Q. Was that before or after this defendant was apprehended?

A. It was about 6 months after these things were found in 1889.

Q. Did you know who this dead man was?

A. No, sir; I didn't know any of the parties.

Q. Were you asked before the grand jury as to who the dead man was?

A. Yes, sir.

Q. Please state if you informed them you didn't know.

A. Yes, sir.

Cross-examination waived.

41 GEORGE WATERS, having been duly sworn on behalf of the Government, was examined by the district attorney, and testified as follows, to wit:

Question. What is your name?

Answer. George Waters.

Q. Where do you live?

A. At Vian Station.

Q. Do you know this defendant, John Graves?

A. Yes, sir.

Q. When did you first see him?

A. Three years ago, on or about the last of January, or first of February.

Q. Of 1889?

A. Yes, sir.

Q. Where did you see him?

A. I saw him at my place, where I lived.

Q. Please state if there was anybody with him.

A. Yes, sir; there was another young man with him.

Q. About what aged man was that young man?

A. As near as I could guess at it, I would suppose that he was about 20 or 25.

Q. About 25?

A. Yes, sir; somewhere along there.

Q. Was he a large man or a small man?

A. Tolerable large man; a spare made man.

Q. Please state if you know anything about his teeth?

A. He had a tooth out on this left side.

Q. You first saw them at your house?

A. Yes, sir.

Q. What was their business there?

A. When they first came to my house I was sick, and they come there and they wanted to make some rails.

Q. Did they come together?

A. Yes, sir.

Q. Horseback, or on foot?

A. On foot. I gave them a job to make me a thousand rails,
42 and they wanted such as grub and something to feed their horses, something that I had that would suit them; they wanted some meat and corn.

Q. They wanted to be paid in that way?

A. Yes, sir; they made me these rails, and I paid them 75 cents a hundred for making them.

Q. How long were they there?

A. I could not say just how long, just how many days they were there, but I let them have six bushels of corn on the seventh day of February.

Q. How do you know that?

A. I had a little transaction there at my farm—over to my store; I gave a man an order or two on the 7th.

Q. Have you examined your books to see if that is right?

A. Yes, sir.

Q. Do you know when you made the final settlements with them?

A. Either the next day, or the second day after that—either the 8th or 9th. I paid them a dollar and a half in money.

Q. You had paid them other things in the store?

A. Yes, sir; paid it at home. I had no transaction with them in the store at all; they came to my house, and I had generally what they needed.

Q. Look at the defendant, and tell me if he is the man who was there?

A. Yes, sir; he is the same man.

Q. How often did you see him during the days that he was there?

A. I didn't see him very often; I saw them some days probably two times a day; they were making rails back of my field.

Q. Where were they staying when they were there?

A. Down on the creek about a mile; they told me they had got a house on the Gurdy place, on the Little Vian.

Q. Were you present in my office when this little diagram was
43 made?

A. Yes, sir. (Witness locates on diagram where he lived, and where defendant and deceased told him they were staying.)

Q. Do you know whether the defendant had his wife and children with him?

A. Other parties told me that he had.

Q. Did you learn anything from him about his wife and children?

A. Yes, sir; he told me that he had a wife and two children.

Q. Did they say where they were going?

A. They said they were going West; just hunting a job of work where ever they could get work; but they were going West.

Q. Do you know where?

A. No, sir; I don't remember just where.

Q. Did they have any horses?

A. They had a couple of horses to an old hack—old-time hack with high springs.

Q. Who did that belong to?

A. The young man told me that it belonged to him.

Q. Did he tell you that in the presence of the defendant?

A. I don't remember that he did.

Q. At any rate they had between them an old hack with high springs?

A. Yes, sir.

Q. How did the horses compare in size?

A. As as well as I remember they were probably about 15 hands high.

Q. How did they compare in size, as to whether one was larger or smaller than the other?

A. One was a little smaller than the other. I never paid a great deal of attention to the horses.

Q. You know that on the 7th of February you let them have some corn?

A. Yes, sir.

Q. The 7th of February, 1889?

A. Yes, sir.

Q. Do you know when they left that place, of your own knowledge, and not what anybody told you?

A. No, sir; I don't know just what day.

44 Q. You didn't see his wife and children?

A. No, sir. The first time they were at my house he told me that he had a wife and children.

Q. Did he tell you how many children he had?

A. Two.

Q. They told you they were going West. You do not know when they left?

A. No, sir; I don't know the day they left.

Q. Now describe the young man.

A. He was a spare-made man, well in proportion, in height, and he was red cheeked, light hair, and a very familiar talking young man.

Q. What kind of clothing did he wear?

A. When he was at my place he wore a knit blouse, and while he was at work he wore that blouse, and he wore a knit shirt at the time he was making these rails, and he wore heavy cavalry boots. It was a boot made something peculiar from the boots in our country, and that is the reason I paid attention to his boots. They were full stock, up high, with a buckled strap up here. This man here did.

Q. The defendant did?

A. Yes, sir. The young man's boot was a cavalry-grained boot.

Q. Did you notice anything else about the boots; any marks or cuts on them?

A. No, sir; I didn't notice particularly. There was some splits there. I noticed that a day or two after he came there.

Q. Look at the boots I now hand you, and say whether they look like the same boots.

A. These are the same boots. There was no boots sold in that country around like these is the reason I noticed these. I remembered they was the kind of boots that was wore generally several years ago; what we call cavalry boots.

Q. How about these little cut places here (indicating on boot).

A. I don't remember, but I think he had them there.

45 Q. Please state if you learned of the finding of the dead body up in the Greenleaf mountain after that, and if so, how long after that?

A. I was coming from Greenleaf court-house, travelling, and a man named Taylor Gurdy told me up there——

Q. Never mind what he told you. Just state whether or not you learned of the finding of this dead body.

A. Yes, sir; I learned that they found the dead body.

Q. How long was it after these men had been at your house that you learned of the finding of that body?

A. Well, it had been about 4 months, I reckon.

Q. That long?

A. Yes, sir; it was in May—the latter part of May. We have the regular term of court on the 4th Monday in May, and I had been to court; was coming back.

Q. If it was the 4th Monday in May, and you had been to court and was coming back, that would put it in June?

A. I don't know whether it was in June or the last of May that I heard this. It was along about the last of May, because I had been to court and coming back.

Q. When you got home you learned that this body had been found?

A. No, sir; when I got to McDaniel's I heard about it and saw the things there.

Q. Was there anything about the body you recognized?

A. I recognized the blouse that he had there, and I recognized the boots.

Q. Recognized them as what?

A. As being the boots and blouse that the young man wore that had been to my house.

Q. Was there anything else you could identify it by?

A. No, sir; only there was a tooth out here, and I told McDaniel——

Q. Never mind what you said; you observed that?

A. Yes, sir.

46 Q. Was there anything else?

A. No, sir.

Q. Do you know where the Sulphur Spring branch crosses the road north of Vian in the Greenleaf mountains?

A. Yes, sir.

Q. How far is that from your place?

A. It is about 16 miles.

Q. Do you know where the body was found; have you ever been at the place?

A. Yes, sir; I know where it is.

Q. That is about 16 miles from your place?

A. Yes, sir.

Q. You say you never saw the wife and children of the defendant at that time?

A. No, sir.

Q. But he told you he had a wife and two children?

A. Yes, sir.

Q. Did he mention the ages of the children?

A. No, sir; I never asked him.

Q. Please state now if you ever saw him any more. I will ask you if from the time he left your house up until anywhere within two years after that you saw or heard of him?

A. No, sir; I did not.

Q. When was it that you next saw him.

A. I saw him last Christmas; he came to my house.

Q. Christmas day?

A. Yes, sir.

Q. Was that the first you saw or heard of him since he left?

A. That was the first.

Q. Last Christmas day would be the 25th or December, 1891?

A. Yes, sir.

Q. Was there anybody with him?

A. No, sir.

Q. What time in the day did he come there?

A. As well as I remember it was about close to 12 o'clock; he came in and spoke to me.

Q. Did he call you by name?

A. No, sir. His face seemed familiar to me right at the mo-
47 ment, and after he set down I recognized him.

Q. Did you know his name?

A. No, sir; I didn't. He never told me that he had ever been there before, and I never said anything to him. I asked him what State he was from, and he said he was from the Sac and Foxes, and I asked him if he was an Indian, and he said no; that he had a lease there. I said, "Did you sell your lease there?" and he said no; that he just left it.

Q. What was his business?

A. He came there and asked me to make a few more rails.

Q. Did he say "a few more?"

A. The contract that was between us; I told him I would take about 5,000 rails; I would have that many made; that he would make them.

Q. This was this last time, at Christmas?

A. Yes, sir; he said he had been making down in the bottom, the timber wasn't very good, and he thought he would come out to the hills and make some rails; and I said, "Go out there and look at the timber and satisfy yourself;" and he said he guessed the timber would be all right anyway, and he would just move out and make me some rails; and so he cut about 700 rails—I was gone to council—and he was gone when I came home; gone back in the bottom.

Q. When you saw him and recognized him as being the same man, what did you do?

A. I didn't do anything; I didn't say anything to him, and he didn't tell me——

Q. Did you say anything to your neighbors to get them to make investigations?

A. Yes, sir; there was other neighbors said they knew him.

Q. Did you procure other neighbors to investigate this matter?

A. Yes, sir; I saw Mr. Palmer; he had saw him, and I told him——

48 Q. Never mind that. If you took any steps towards having other persons identify him you may state that.

A. Yes, sir.

Q. Did you see his wife and children afterwards?

A. Yes, sir; after they moved.

Q. How many of them were there?

A. Two.

Q. How old were the children then?

A. They looked to be—one five or six, and the other ten or twelve; I could not tell exactly, for I never asked.

Q. You would take them to be about that age?

A. Yes, sir.

Q. How did he come there this time?

A. He came there with an ox team.

Q. Where did he camp, if he camped at all?

A. Staid in one of my little rent houses there; cabin.

Q. You never talked to him about his being there before?

A. No, sir; he didn't tell me that he had ever been there before.

Q. Did you talk to him about it?

A. No, sir.

Q. It was about three years, then, from the time you saw him there with a stranger until you saw him again on Christmas day?

A. Yes, sir.

Q. Was your wife there when he came there on Christmas?

A. Yes, sir.

Q. Were you before the grand jury?

A. Yes, sir.

Q. Did you know that man's name?

A. No, sir; I had asked the name, but I could not remember it.

Q. You had forgotten the name?

A. Yes, sir.

Q. Were you asked before the grand jury if you knew the name of the man?

A. Yes, sir.

Q. What did you tell them?

49 A. I told them I didn't remember his name.

Q. You speak of one of the front teeth being out on the left side; please state if he had any other teeth out at the time that he was at your house?

A. I don't remember noticing any other teeth. How I came to notice that, we were setting facing each other one day talking—I had been sort of sick, and my wife was setting in another place, and we were all talking and in his smile I noticed where that tooth was out. It showed all the time in his smile in talking.

Q. The place where this body was found up there on that creek was in the Cherokee Nation, was it?

A. Yes, sir.

Q. You live in the Cherokee Nation?

A. Yes, sir.

Q. It is almost in the heart of the Cherokee Nation—almost in the middle of it?

A. No, not right in the middle of it.

Q. This place, Fort Smith, is the nearest place out of it?

A. Yes, sir.

Q. How far is it from here?

A. Forty miles.

Q. The defendant came there; did you learn from where he came when he was at your house first?

A. Yes, sir; I asked them where they came from, but I didn't remember afterwards.

Q. Were these men white men or Indians?

A. They claimed to be white men.

Q. The defendant and the deceased both?

A. Yes, sir.

Q. What would you judge these horses to be worth?

A. It would be a great deal owing to the way——

Q. Have you any idea yourself?

A. Yes, sir.

Q. Just tell me how much you would think they were worth?

A. I would suppose they were worth about $75 apiece or $50.00 apiece.

50 Q. From 50 to $75.00 apiece?

A. Yes, sir.

Q. The spring wagon was an old one, you say?

A. Yes, sir.

Q. What do you call it?

A. A hack; one of these high springs.

Q. How many seats?

A. It was intended to have two or three seats; pretty good size. It was a two-horse hack. They moved in that hack, he told me, and took their grub along. You may know by that about what size hack it was.

Cross-examination by Mr. N. L. MARMON:

Q. What size man did you say this young man was?

A. He was a pretty good-size man. He would weigh about 180 or '90 pounds; somewheres along there.

Q. About how tall was he?

A. I could not just really tell just how high he was.

Q. How would he compare in height to Judge Clayton?

A. He was nearly or about as tall.

Q. He had light hair and blue eyes?

A. Yes, sir.

Q. How would his hair compare to Mr. White's [referring to one of the court ba'liffs]?

A. It does not compare with it.

Q. Was it lighter?

A. A little bit, I think. The hair, I think, is here. It was just about such hair as Jim Smith's.

Q. That is the Indian that just testified?

A. Yes, sir.

Q. Was it long or short?

A. Short.

Q. Had he any mustache or whiskers?

A. No, sir; he had a few, but his face was smooth when he was at my house.

51 Q. Did he have any mustache?

A. No, sir; none to amount to anything.

Q. I believe you say they gave you their names, but you have forgotten them, and they told you where they were from?

A. Yes, sir; I ask strangers frequently that way. Of course I did not pay any attention, and it was just the same way this time.

Q. Which was the larger man, the defendant here or the one that was along with him?

A. The one that was killed was a little larger man.

Q. He was a little the tallest and a little the heaviest?

A. Yes, sir.

Q. You have no recollection at all as to the names they gave you?

A. No, sir.

Q. Do you remember anything about their first names, their given names? What they called each other, Jim, George, Bob, Sam, John, or what?

A. No, sir; I don't remember anything about that.

Q. How was the defendant dressed at that time?

A. He wore a brown coat, jeans, frock tail coat.

Q. What kind of goods was it?

A. I think it was jeans. I think one of the witnesses has got a piece of it. It looked like it was a piece of it. They have a piece here about the color that he wore.

Q. You remember about the color of the blouse that the young man wore; you remember that he wore a knit shirt while he was at work at your house?

A. Yes, sir.

Q. What kind of a shirt did this defendant wear?

A. I could not just remember just what kind of a shirt he had on.

Q. Did he have a collar? Did he wear a collar to the shirt or

52 did he wear a collar separate?

A. Well, no. The reason why I did not pay so much attention to the defendant he never had much to say; he was always still. He never talked to me. The other young man did the business himself. He came to me always, and of course I had more talk with him.

Q. Then of course you paid more attention to the other man?

A. Yes, sir.

Q. You noticed him closer?

A. I don't know that I noticed him closer, but I saw the young man a little oftener. He made one or two trips oftener then the other one did.

Q. If you had paid as much attention to him you would know what kind of clothes he had on as well as the other?

A. Yes, sir; enough to know him.

Q. You don't remember what kind of pants he had on?

A. I believe they were overalls; I am certain they were overalls.

Q. What color?

A. They were brown. He wore boots with straps around them; high top boots. They were not exactly like these.

Q. They were not cavalry boots like these?

A. Yes, sir; but they were not grained boots.

Q. They were not like these here?

A. No, sir.

Q. What kind of a hat did he have on?

A. I could not remember just what kind a hat he was wearing.

Q. What kind of a hat did the young man wear?

A. I don't remember that.

Q. Did they have caps or hats?

A. They wore hats, but what kind I don't remember.

Q. Wasn't it broad-brim white hats that these parties you saw wore?

A. I don't remember about that.

53 Q. How was the defendant as to beard? Did he have any beard then?

A. No, sir; he was clean shaved. He wore a mustache.

Q. When you saw him again last winter how was he then?

A. He didn't let it grow out as much as he has now. He had it off short like mine.

Q. Did he have it as short as yours?

A. I suppose he did, probably. Anyway it wasn't as long as it is now.

Q. You are pretty close shaved now.

A. His might have been a little longer.

Q. Do you see anybody about the court room with beard about as long as his was then?

A. I don't know that I do.

Q. Was his beard about like Judge Clayton's?

A. No, sir; he never wore beard that way. He didn't have whiskers like he has now. I don't know whether he was just shaved or whether he let it grow out a little or not; but he wore mustache in the style that we wear now. I could not say that he had just shaved or had shaved a week or two before.

Here court took a recess until 1.30 p. m.

AFTERNOON SESSION, 2.30 o'clock.

Examination continued by Mr. C. J. FREDERICK:

Q. Did you learn the names of either one of these men that worked there for you—made these rails in 1889?

A. They told me their names, but I have forgotten them.

Q. You do not remember at all about their names?

A. No, sir.

Q. Did you know where they came from?

A. I asked them where they came from at the time, but I forget where they came from.

54 Q. You don't know where they came from?

A. No, sir. I was kind of sick at the time. I asked the question, as is generally rulable by anybody when they came around.

Q. You sold them six bushels of corn, I believe?

A. Yes, sir.

Q. You gave them an order for that corn to the store?

A. No, sir.

Q. You did give them an order to the store for something, did you not?

A. No, sir; not to them, I didn't; it was to another party.

Q. Did you just give them 6 bushels of corn and a dollar and a half in money? Is that all you gave them?

A. No, sir; I let them have some meat and some meal.

Q. How long did they remain there about you?

A. I suppose it was near about a week; somewheres along there.

Q. They were at your house frequently, you say?

A. Yes, sir. They came there to get their pay and talk to me about the work.

Q. Were you sick all the time they were there?

A. I was kind of sick.

Q. Sort of puny, but not bedridden?

A. Yes, sir. I was able to ride a horse around.

Q. Were you out where they were making rails?

A. Yes, sir; I was out there two or three times.

Q. Did either one of them stay all night at your place?

A. No, sir.

Q. Did they take any meals there?

A. No, sir.

Q. They were there something like a week?

A. Yes, sir; something near; long enough to make a thousand rails. I don't know just how many days it took them.

55 Q. It does not take two men long to make a thousand rails, does it?

A. No, sir; they were inclined to be awkward. They said that was the first rails that they had ever made.

Q. That did look like they were awkward, didn't it?

A. Yes, sir; they said that they had been making ties up at the tunnel on the Frisco; they had made ties up there, but hadn't made any rails. They would make a few rails in order to get grub and feed for the team.

Q. When was that they were there?

A. In 1889, in February.

Q. Are you sure of that?

A. Yes, sir.

Q. How can you fix it in February, 1889?

A. Because I remember it.

Q. You can not be mistaken about it?

A. No, sir.

Q. About the 7th of February, I believe you fix it, you paid them some corn?

A. Yes, sir.

Q. You settled with them the day after?

A. Yes, sir; next day or day or two afterwards.

Q. Not later than the ninth you paid them the balance in money?

A. Yes, sir; somewhere along there.

Q. You didn't see them any more after that?

A. No, sir.

Q. Did you see the team they had?

A. Yes, sir; they used the team there. They had a team, and I rode with them in the back over to where my corn was. I was inclined to be sick.

Q. You talked with them freely I suppose?

A. Yes, sir; I talked with them.

Q. Did your wife get acquainted with them?

A. Yes, sir; she saw them. She had some talk with the young man.

Q. This lady who is here, Mrs. Waters, is your wife?

A. Yes, sir.

56 Q. You say she had some talk with them?

A. She had some talk with the young man. She didn't talk with this one (the defendant) that I remember; she would know whether she did or not, I suppose.

Q. How far do you live from here?

A. 40 miles.

Q. You live on this K. & A. V. road near Vian?

A. Yes, sir.

Q. Had that road been built then?

A. Yes, sir.

Q. How long was Graves gone- about 3 years?

A. Yes, sir; near about; it may have lacked a few days of it.

Q. He came back there Christmas day, did he?

A. Yes, sir.

Q. Was there anybody else there when he came back to your house?

A. There was some boys there.

Q. Three or four persons there, wasn't there?

A. Yes, sir; my family was there.

Q. In speaking to your family you speak Cherokee, do you not?

A. No, sir.

Q. Do you use English in your family?

A. Yes, sir.

Q. You and your wife both?

A. Yes, sir.

Q. You do speak the Cherokee language, do you not?

A. Yes, sir; I speak it myself; my family do not.

Q. Your wife does not?

A. No, sir.

Q. Do you know who these persons were at your house when Graves came down Christmas—these men who were there Christmas day?

A. There was several there.

Q. Do you remember the names of any of them?

A. No, sir; I don't know that I remember them. My boy is one.

Q. Is he here?

A. Yes, sir.

Q. What is his name?

A. John Waters. Calvin Starr was there, and some of the Millers.

57 Q. Is Calvin here?

A. No, sir.

Q. Calvin Starr, your own son John, and who else?

A. My family was there.

Q. Your family—that is your wife and children, I suppose?

A. Yes, sir.

Q. Graves came in; what did he say when he came in?

A. He said he was hunting a job making rails.

Q. Didn't he come in and inquire which was Mr. Waters?

A. No, sir; I don't know that he did.

Q. Didn't he inquire for you, now?

A. He just came in, and I told him to take a chair. He told me he was hunting a job of work, rail-making, and I told him I had some to make, and he said there was a couple more men with him, a man and his two sons, would help him to make the rails; they were not with him that day.

Q. How long did he remain there?

A. He didn't stay there but a little while. He went after his family.

Q. As much as five or ten minutes, do you think?

A. A little longer than that, I suppose.

Q. Did he eat his dinner with you?

A. No, sir.

Q. Did he remain as much as fifteen or twenty minutes?

A. I suppose it was that long; I don't remember how long it was now.

Q. Did you learn his name then?

A. Yes, sir.

Q. You asked him his name, did you?

A. Yes, sir.

Q. What did he tell you?

A. He told me his name was Graves.

Q. Where did he tell you he had been?

A. He didn't tell me where he had been to, only down in the bottom making some rails. Of course I asked him which State he was from, and he told me he was from the Sac and Fox Agency.

58 Q. He didn't claim to be an Indian, did he?

A. I asked him if he was an Indian, and he said no; he said he had a lease there; I asked him if he sold his lease, and he said he just left it.

Q. Didn't claim any citizenship, then?

A. No, sir; not to me he didn't.

Q. Can you tell us how he was dressed—what kind of clothing he had at this time?

A. Just common, everyday clothes, coat and pants.

Q. Did he have any beard on his face then?

A. He had a mustache.

Q. Any other beard?

A. Yes, sir; he had some other beard, but it was not as long as it is now.

Q. How long was it—an inch or two?

A. I could not say just how long it was?

Q. Did he wear chin whiskers then?

A. No, sir—well, he had some beard. Of course he wasn't shaved off clean like yours.

Q. Give us some idea about how long it was. About how long do you think it had been growing?

A. I could not tell you how long it had been growing?

Q. But you could give us some idea about the length of it. You could do that. Was it as long as his mustache is now?

A. Yes, sir; he has wore them every time I ever seen them.

Q. I understand, but I am speaking about the chin whiskers.

A. No; he cut them off; the first time I ever saw him they were cut off; he just had a mustache.

Q. I am speaking about last Christmas now.

A. They were cut off much closer than they are now?

Q. He might have had them cut much closer and yet have considerable beard.

A. He hadn't just shaved; I will tell you that.

59 Q. How long is his beard now; what would you say from your observation?

A. I could not say.

Q. What would be your opinion?

A. I could not say.

Q. Look at him and say what your opinion would be.

A. It is something I never done, to measure men's beards; I could not say.

Q. Would you say it was an inch long now or something like that?

A. I might say about that; I could not say just an inch to an inch.

Q. We do not ask you to do that.

A. Because I don't know.

Q. Could you say now in your best recollection and impression whether his beard was half as long as it is now?

A. No, sir; I suppose it must have been shorter.

Q. Shorter than half as long?

A. Yes, sir; at that time.

Q. When you saw him in February, 1889, was it half as long as it is now, do you think?

A. No, sir.

Q. Was he cleane shaved then?

A. No, sir; it wasn't right clean shaved then; he had shaved though.

Q. Did you notice any color in the beard and his mustache now and then?

A. No, sir.

Q. Did the man at your house have any gray about him, his beard or anything; either one of the men at your house have any gray in their beard or hair?

A. There was no gray on them that I remember of.

Q. What sized boots did that young man wear, what number?

A. I suppose that he might have wore about 8 or 9's; somewhere along there; of course I never asked the man what size boots he wore.

Q. What size did Graves wear?

A. I never did ask him.

60 Q. But you can give an idea?

A. I suppose that he wears about an 8—7 or an 8.

Q. You think that the other one had the larger foot?

A. Yes, sir.

Q. About how much would the young man weigh, would you suppose?

A. I suppose about 180, somewhere along there; I would not say that he would weigh 200, but 180 or 190, somewhere along there.

Q. What kind of eyes did the other man have?

A. Blue eyes.

Q. What complexion?

A. Fair complected, light; red face.

Q. What was the color of the hair?

A. Light color.

Q. I believe you say he was about the complexion of Smith; about the same color of hair?

A. Yes, sir.

Q. His mustache was what you would call red or sandy?

A. Yes, sir.

Q. About like Smith's?

A. Yes, sir; and his hair.

Q. About like Smith's beard?

A. He had a smooth face.

Q. I thought he had a light mustache?

A. It was very light; he was a light-complected man, almost like you, although he was more red in the face. His hair was about like yours, not much difference; he was what you would call a smooth-faced young man.

Q. What you guess his age to be?

A. I suppose it was about 20 or 25 years old.

Redirect examination:

By the DISTRICT ATTORNEY. You state they told you they had been making ties at the tunnel on the Frisco road?

A. Yes, sir.

Q. What tunnel?

A. Up about the Boston Mountains.

61 Q. At Winslow?

A. Yes, sir; that was my understanding.

Q. How come this subject to come up?

A. How come it to come up was this: they had no tools, no iron wedges, and I didn't have any, and they said they had plenty of tools, but they left them up about the tunnel, where they had made some ties, and had wedges. They said if they had brought them along they would have used them—come in good play to use them.

Q. That is the way it came up?

A. Yes, sir.

Q. I want to ask you a little more particularly about this 7th day of February transaction. What was that transaction you went to your books to see about that you fix it that day that you sold this man some corn?

A. When I was going over to let this man have some corn I owed a boy five dollars, and he came to me for an order to take a pair a boots out of the store—Calvin Starr.

Q. You gave him that order?

A. Yes, sir; that very day.

Q. You have looked at your books since, and ascertained that was the day you gave him that order, and that was the same day?

A. Yes, sir.

Q. That is the way you fix that?
A. Yes, sir.
Mr. FREDERICK. Have you got the book here?
A. No, sir; I did not bring it.
Mr. FREDERICK. That is hardly competent.
The DISTRICT ATTORNEY. I think it is.

62 Miss MARY WATERS, having been duly sworn upon behalf of the Government, was examined by the district attorney, and testified as follows, to wit:

Question. You are the wife of George Waters?
Answer. Yes, sir.
Q. Where do you live?
A. I live at Vian, Cherokee Nation.
Q. Do you know the defendant, John Graves?
A. Yes, sir.
Q. When did you first see him?
A. The first time I saw him it has been three years ago last February, about the first of February.
Q. Where did you see him?
A. He came to my house and hired to my husband to make some rails.
Q. Was there anybody with him?
A. Yes, sir; there was a young man with him.
Q. Did you know his name?
A. No, sir; I didn't learn his name; I asked him his name, but I have forgotten it.
Q. Did you tell the grand jury his name?
A. No, sir.
Q. You were asked by them, but you did not know it?
A. Yes, sir.
Q. What time in the day did these two men come to your house the first time they come?
A. I don't recollect just exactly, but I believe it was about 12; it may have been after 12 o'clock; I do not remember.
Q. What sort of looking man was this young man that came there? About how old do you think he was?
A. I took him to be about 25 or 30 years of age. He was a tolerable large man, big, flushy-faced, red complected, had large dimple in each cheek, and one in the chin; had large blue eyes. He had real light hair.

Q. Do you know anything about his teeth?
63 A. Yes, sir; he had a tooth out on this left side up above right next to the two front teeth, if I am not mistaken.

Q. Do you know what they were doing there? Did you hear them say? Did you hear either one of them say where they were going?
A. I heard them say, but I don't remember where they said they were going.
Q. Do you know where they were from?
A. No, sir; I asked the question, but I have forgotten.
Q. How often did you see them?
A. I seen the young man three or four different times and this gentleman two or three times.

Q. That was in February, 1889?
A. Yes, sir.
Q. Do you remember the kind of clothing that the young man had on?
A. I don't know just exactly, but he had on knit blouse, as well as I remember; it was a brown, dark-looking color.
Q. Did you ever see that blouse afterwards?
A. No, sir; I have never seen it since.
Q. You did not go up to see the things?
A. No, sir.
Q. How long did they remain there?
A. I don't remember just exactly; it was a week or a little over.
Q. You are certain this defendant is the man?
A. Yes, sir.
Q. Do you know whether he had his wife and children with him?
A. He had his wife and children at that time.
Q. Did you see them?
A. No, sir; I didn't see them; my brother saw them.
Q. Did you know from the defendant that he had his wife and children?
A. No, sir; the young man told me that he had his wife and two children is how I found it out.
64 Q. Was he with the defendant when he told you that?
A. No, sir; the defendant was not present then.
Q. Never mind that then. Did you see them when they left?
A. No, sir.
Q. You don't know which way they went then?
No, sir.
Q. When did you next see the defendant?
A. The next time I saw Mr. Graves he came to my house last Christmas morning.
Q. Did he come by himself?
A. Yes, sir; he was alone.
Q. Had you heard of this dead body being found before he came back the last time?
A. Yes, sir.
Q. You did not see any of the things that were taken from there?
A. No, sir.
Q. You say that he came there Christmas?
A. Yes, sir.
Q. What was his business there?
A. He came back to hire to make rails for my husband.
Q. He made rails the first time?
A. Yes, sir, and also the last time.
Q. Did you see him when he first came in the house?
A. Yes, sir.
Q. Did you see his family at that time; this last time?
A. Yes, sir.
Q. Where did you see them?
A. They moved over to my house, a little rent house.
Q. How many children did he have?
A. Two.
Q. Wife and two children?

A. Yes, sir.

Q. How old were the children?

A. The little girl looked to be about 7 or 8 years old and the little boy about 4 or 5.

Q. Last Christmas?

A. Yes, sir.

Q. You did not see them when they were there the first time?

65 A. No, sir; I never saw them before.

Q. Please state if when he came to your house you recognized him as being the same man.

A. Yes, sir; I recognized him as being the same man as soon as he came in.

Q. Was anything about him besides his general appearance?

A. Yes, sir; I knew the expression of his eyes, his make, and his hair, and also his finger nails were different.

Q. What about his finger nails?

A. They looked kind of brownish striped, different from anyone else's I ever saw.

Q. Did you learn from him the cause of it?

A. No, sir; I never asked him.

Q. You are certain this defendant is the same man?

A. Yes, sir; he is the same man exactly.

Q. Do you know what sort of boots the deceased wore?

A. He wore big heavy boots, come away up ever so high; they were rough looking; there was a piece came around here like a little different from any I had ever noticed.

Q. Do you remember the defendant's boots?

A. I believe I do a little; I am not certain; I never noticed particularly.

Q. Did you ever see that strange man after that?

A. No, sir; I never saw nobody that looked like him.

Q. When the defendant came back you say that he was not with him.

A. No, sir.

Q. Did you see the team that they had the first time?

A. Yes, sir; they had horses and buggy, or hack.

Q. You say you saw him several times when he was there;

A. Yes, sir.

66 Q. Was your son at home when he came there the last time?

A. I don't know where he was; I don't recollect whether he was there or not—Yes, he was at home.

Q. Was he there when they were there the first time?

A. I think he was.

Q. You have a daughter, too, have you not?

A. Yes, sir.

Q. You do not know, of course, where they went to or nothing about that?

A. No, sir; I don't know where they went to.

Q. Do you know who owned the hack and horses?

A. The young man told me that they were his.

Mr. MARMON (of counsel for defense). I object to that.

The DISTRICT ATTORNEY. Who seemed to have charge of them?

A. He did.
Q. How did the defendant come the last time?
A. He came in an ox team, with a wagon.

Cross-examination:

By Mr. C. J. FREDERICK. You think the young man was about 25 or 30 years old?
A. Yes, sir; I took him to be that old.
Q. You say he was a large man?
A. Yes, sir; he was a big man in proportion every way; he weighed about 200 pounds, I reckon.
Q. You saw him three or four times, you say?
A. Yes, sir.
Q. Did you have much conversation with him?
A. Well, once or twice I did.
Q. You say that he wore large heavy boots with a strap across the instep, did you say?
A. No, sir; it was right around here, looked like (indicating on
67 ankle and top of foot.) It looked like it was sewed.
Q. Were there any straps at all?
A. No, sir; not that I saw.
Q. About what number of boot did he wear?
A. I don't know; as well as I can guess at it, about 10 or 11; I am not much of a hand at guessing at men's boots.
Q. Do you remember how Graves was dressed at that time, when they were first there?
A. No, sir; I don't recollect how he was dressed.
Q. Do you recollect what kind of hats these men wore?
A. I don't believe I do.
Q. Do you remember whether they wore hats or caps?
A. They wore hats.
Q. You say that this young man wore a knit blouse. What was the color of the blouse?
A. I don't just exactly remember the color of the blouse; it was kind of brownish or dark looking.
Q. Would he wear that as his outside garment?
A. I never noticed that; he had it on; I noticed that.
Q. Would he have a coat on over it?
A. I don't believe he did; I never noticed.
Q. Did you notice what kind of a coat that he wore?
A. No, sir.
Q. What kind of pants?
A. No, sir.
Q. What kind of a coat did the defendant wear?
A. I could not say.
Q. You didn't notice him enough to tell?
A. I never had talked with him as much as I did with the young man; the young man would always come after anything.
Q. You saw the defendant only two or three times, I believe, you say?
A. Yes, sir.
68 Q. You say that the young man's hair was very light?
A. Yes, sir; that is, tolerable light.

Q. Did he wear a beard?
A. No, sir.
Q. No mustache?
A. If he had any it was a mighty little, as well as I recollect.
Q. Did Graves have a beard?
A. Yes, sir.
Q. How; just a mustache?
A. He had a mustache.
Q. Did he have beard on his chin?
A. I don't recollect whether he did or not; he might have been shaved.
Q. Did he look like he does now?
A. Yes, sir; all except this beard here on his chin wasn't there; it was shaved off then, but the mustache was there; it has been there all the time.
Q. When he came back last Christmas did he have a beard?
A. He was shaved of all except his mustache.
Q. The same way as when he first came?
A. Yes, sir.
Q. Did you notice any gray in his beard?
A. No, sir; I never noticed that.
Q. You say this young man had a tooth out?
A. Yes, sir.
Q. More than one?
A. He didn't have but one that I discovered; if there was any other one out I didn't see it.
Q. Did you notice anything about Graves having any teeth out?
A. No, sir.
Q. You could not say whether he had one out or not?
A. No, sir.
Q. You never noticed him enough to see it?
A. No, sir; I never noticed his mouth that close.
Q. What did they say their names were?
A. I don't recollect.
Q. Did they give any name?
69 A. I don't remember whether I asked his name or not; I have asked the other man, but I have forgotten it.
Q. You have no idea about what it was?
A. No, sir.
Q. Did you ask this defendant what his name was?
A. No, sir.
Q. Do you think that you learn'd his name at all?
A. I don't remember of ever hearing his name until he came back the last time.
Q. When he came back the last time how did you learn the name of this man?
A. I don't recollect who I first heard call his name, or how I first heard it.
Q. It was last Christmas day that he came back?
A. Yes, sir.
Q. Did you ask him what became of the young man that was with him?
A. No, sir; I never asked him any questions.

Q. Did you recognize him when he came in?
A. I recognized him as soon as I saw him.
Q. Did you remind him about his having been there before?
A. No, sir; I never said a word about it to him.
Q. Did Mr. Waters?
A. No, sir.
Q. What time was it that he first came to your house the first time?
A. The first time he came it was about the first of February, along about the first.
Q. And remained there about how long, if you remember?
A. I don't remember just exactly how long; a week or ten days, or maybe a little over. It was a week, I know.
Q. Are you pretty sure it was the first of February?
A. Yes, sir; along there somewheres.
Q. You think you could not be mistaken about that?
A. Yes, sir.
Q. Was it February, 1889, three years ago?
A. Yes, sir.
Q. Not two years ago?
A. No, sir; three years ago last February.
70 Q. You think you are certain of that?
A. Yes, sir.
Q. You think you recognize this defendant by his having large blue eyes?
A. He ain't got blue eyes; it was the man who was killed.
Q. How do you recognize this defendant?
A. By his eyes, complection, make, walk, hair, and his fingers.
Q. They were both very remarkable men in their ways and appearance; that is, they were unlike anybody else?
A. Yes, sir.
Q. What is there about this man, his expression, that is different from anybody else you ever saw?
A. There is no two men who walk alike, nor two men who look alike. He has got an expression in his eye that anybody would know him wherever they saw him.
Q. That is the reason you think you can be sure this is the same man?
A. Yes, sir; that is the same man; I am positive about it.
Q. You could not be mistaken about it?
A. No, sir.
Q. He had been away nearly three years?
A. Yes, sir.
Q. You had seen him twice?
A. Yes, sir.
Q. Did you talk with him when he came back the last time?
A. Mighty little.
Q. What was there about the finger nails, did you say; that they had growed in, or something?
A. I said that his fingers was a little striped, brown black, looked striped; inclined to be cupped a little.
Q. You never saw anybody that way before?
A. No, sir.

Q. When did you first notice that?

A. When he came in my house first, three years ago, and set down by the fireside.

Q. Did you notice them again when he came back?

A. Yes, sir; I noticed them every time I saw him.

71 Q. Did you mention to him anything about the peculiarity of his nails?

A. No, sir; I never said anything to him about it.

Q. Where did they go to when they left the first time?

A. I don't know where they went to when they left.

Q. When they first came did they stay at your house any?

A. No, sir; they staid in a house about a mile below me.

Q. You were a witness before the commissioner the 4th of February, last?

A. Yes, sir.

Q. Let me read you some of your testimony delivered there, and see if you testified to it: "The first time I saw the defendant was three years ago now. This man that was killed was with the defendant. They made rails for me. They staid 6 or 7 days at my house."

A. I meant they staid there and made rails in the daytime, right on the farm there, but the whole entire family was not there.

Q. How far from your house did they make rails?

A. Not very far; about 150 yards, or maybe further; I don't know just exactly how far; just across a little field.

Q. Did they take their meals there?

A. I don't know whether they did or not.

Q. I mean at your table?

A. No, sir; they didn't eat at my table; they boarded themselves.

Q. Did they sleep in your house?

A. No, sir.

Q. They neither eat nor slept in your house?

A. No, sir.

Q. You didn't see them eat at all?

A. No, sir.

Q. How far from your house did they stay of nights?

A. It was about a mile, I reckon, where the little house was where they staid in.

72 Q. Did you have them employed?

A. My husband had them employed.

Q. I will read a little further in your examination before the commissioner: "This man that was killed was with the defendant; they made rails for me." Did they make rails for you?

A. Yes, sir; made rails for my old man.

Q. What kind of horses did they have when they were there at first?

A. As well as I recollect they were a dark brown or a dark bay; I don't know which they might be determined.

Q. Was they large or small horses?

A. Just medium size I would call them.

Q. What condition were they in?

A. Pretty good condition.

Q. Both the same color?

A. Pretty near it; yes, sir.
Q. About the same size?
A. One was a little bigger than the other one.
Q. What kind of a hack did they have?
A. I don't know; I never noticed it; I seen it, but I didn't pay any attention to it.
Q. Was it an open top or covered?
A. It was an open top, not covered.
Q. Was there anybody with them when they were at your house at first?
A. Nobody but him and the man that was killed, and his wife and the children.
Q. You did not see the wife and children?
A. I didn't see them the first time. I didn't see anybody the first time but these men.
Q. You never saw his wife and children?
A. No, sir, not the first time.
Q. You don't know where that young man is now?
A. No, sir.
Q. You have never seen him since?
A. No, sir.

73 Q. Do you think you would know him if you saw him again?
A. If he was alive I would know him.

Q. You could not be mistaken in the identity of the person?
A. No, sir.

Redirect examination by the DISTRICT ATTORNEY:

Q. You saw his wife the last time?
A. Yes, sir.
Q. Is she here somewhere?
A. Yes, sir; I saw her this morning.
Q. The same woman that he brought with him the last time to your house?
A. Yes, sir.

Recross-examination by Mr. N. L. MARMON:

Q. You do not know Judge Little, of this county, do you?
A. No, sir.
Q. You never saw a man in your life that looked like this one?
A. No, sir; I never noticed anybody that resembled him. Of course, there might have been somebody that resembled him, but I never saw them.

74 JAMES BARNES, having been duly sworn upon behalf of the Government, was examined by the district attorney, and testified as follows, to wit:

Question. Your name is James Barnes?
Answer. Yes, sir.
Q. Where do you live?
A. At Braggs Station.
Q. How far is that from Vian?
A. It is about 20 miles, I guess, or 23.
Q. Do you know this defendant?

A. I don't know him, but I have seen him a couple of times, two or three times.

Q. Where did you first see him?

A. I saw him on Greenl'af Mountain.

Q. When was that?

A. That was about the 13th of February, 1889. He was camped.

Q. Where was he camped?

A. He was camped in a branch.

Q. Do you know where the Sulphur Springs Branch is?

A. Yes, sir; I supposed that to be the branch; I never did trace the branch up to see what it was.

Q. The branch on Greenleaf Mountain?

A. Yes, sir.

Q. Where do you live?

A. At Braggs Station.

Q. Where did you live at that time?

A. I lived about four miles and a half this side of Braggs.

Q. How far from Greenleaf Mountain?

A. I lived right at the west foot of the mountain.

Q. In going from there over to Vian you had to cross the mountain?

A. Yes, sir.

Q. In going from Vian to where you lived you had to cross the
75 mountain?

A. Yes, sir.

Q. Do you know where Robert Williams lived?

A. He lived just over the mountain on the east side.

Q. He lived at the foot of the mountain on one side and you on the other side?

A. Yes, sir.

Q. How far apart?

A. I suppose it is about 6 or 7 miles. (Witness is here shown diagram.) He was camped right on the right-hand side of the road, and the other man was watering a horse on left-hand side of the road.

Q. What time in the evening was it you saw him there?

A. It was tolerable late in the evening.

Q. Did you observe anybody else there but the defendant?

A. There was another man there, and a woman.

Q. Any children?

A. I saw a little girl.

Q. What was the defendant doing?

A. He was setting on the end of the wagon tongue or hack tongue.

Q. Was it a hack?

A. Yes, sir; I believe it was an old hack.

Q. What was the other man doing?

A. He was watering his horse.

Q. Did you learn his name?

A. No, sir; I never learned his name.

Q. Did you talk to either one of them?

A. I talked to this man over here.

Q. What kind of a looking man was he?

A. He was a tolerable large red-complected fellow, tolerable light hair.

Q. That man was watering how many horses?
A. He had two horses.
Q. The defendant was sitting on the wagon tongue?
A. Yes, sir.
Q. Where was the woman and children?
A. She was standing off on the right-hand side by the wagon.
Q. Was there any fire built there?
76 A. No, sir; I never noticed any fire at all.
Q. What time in the evening was that?
A. It was tolerable late; just about sundown.
Q. Where were you going?
A. I was going home.
Q. From where?
A. From Salisaw, my father-in-law's.
Q. Where is Salisaw?
A. It is 30 miles from here.
Q. Is it between Vian and the mountain?
A. No, sir; it is between here and Vian.
Q. Did you pass through Vian?
A. Yes, sir.
Q. You had been to Salisaw and passed through Vian on your way home, on the other side of the mountain?
A. Yes, sir.
Q. When you came to this place you speak of, to this creek, you found these people camped?
A. Yes, sir.
Q. I believe you stopped and talked with him?
A. Yes, sir; just a few minutes.
Q. Where did you go then?
A. I went on home.
Q. Please state if you saw the defendant after that.
A. Yes, sir; the next morning I had business out to Braggs, and I was on my way back home from Braggs.
Q. Braggs is still further on, further north?
A. Yes, sir; 4 miles and a half beyond there.
Q. You went the next morning up to Braggs, and on your way back home you met this man again?
A. Yes, sir.
Q. Where was he?
A. He was near a place they call the Old Nigger School House. I met him about 9 or 10 o'clock.
Q. How far from the camp where you had seen him the night before?
A. I suppose it to be about 7 or 8 or may be 9 miles.
Q. How was he, horseback or on foot?
77 A. He was in the same old hack.
Q. Was he driving?
A. I suppose he was.
Q. Was the other man with him?
A. No, sir; I never saw anybody else but him and the woman and the little girl.
Q. The other man you did not see?

A. No, sir.
Q. That was about 8 miles from the camp?
A. Yes, sir.
Q. Is this defendant the man?
A. Yes, sir; I believe he is.
Q. Have you ever seen the other man since?
A. No, sir.
Q. Did you know who he was?
A. No, sir.
Q. Did you learn his name?
A. No, sir.
Q. Were you before the grand jury?
A. Yes, sir.
Q. Please state if you were asked as to the name of the man when you were before the grand jury?
A. I believe I was.
Q. Did you tell them you didn't know?
A. Yes, sir.
Q. You didn't know the names?
A. No, sir.
Q. When did you next see the defendant after that?
A. I never saw him any more after that next day until I saw him here before the commissioner.
Q. Have you any way of fixing the day as being the 13th of February that you saw him?
A. No way except that I had a note that was due; I had bought a place from parties up there, and there was a note due on that day for five or six dollars, and that was my business to Salisaw, to pay that note off.
Q. Were you before the commissioner?
A. Yes, sir.
Q. Do you know where they were going?
A. Nothing only just what the man said.
Mr. FREDERICK (of counsel for defense). You need not state what he said.
78 The COURT. It is always competent for a man to state what he has been told by another as to where he was going on a journey.
The WITNESS. I asked him where he was going, and which way he was bound for, and he said "Oklohoma." I said "Are you bound for some land?" And he said "Yes." That is about all the words that was spoken, only bidding the time of day.
Q. What color were the horses?
A. One was a bay—they were both bays, only one was a little darker han the other.
Q. About how high a man was he? Do you know or could you tell?
A. I could not hardly tell.
Q. Do you know the color of his eyes?
A. He had large, blue eyes.
Q. Did he have a coat on?
A. He had on a kind of a jacket; what we call knit jackets.
Q. When you met this defendant the next day, 8 or 9 miles from there, this man, you say, was not along?

A. No, sir; I never noticed him at all.
Q. Did the hack have a top to it?
A. Yes, sir; it had an old top on it, or wagon sheet, it looked to me like it was over it.
Q. Was it a spring hack?
A. Yes, sir.
Q. Do you know anything about the finding of the body?
A. No, sir; I never knew anything about it until some of the parties were telling me they found a body over there in the mountains.
Q. How far was that from Vian?
A. About 16 or 17 miles.
Q. Do you remember whether he wore a beard then like he has got now?
A. No, sir; he did not.
Q. When you saw him before the commissioner what kind of a beard did he have?
A. He was wooly all over.
Q. Was it as long then as it is now?
A. No, sir; it was not.

79 Cross-examination by Mr. N. L. MARMON:

Q. Where do you live?
A. I live about four miles and a half this side of Bragg's Station.
Q. Your first name is James, I believe?
A. Yes, sir.
Q. Have you ever been here charged with any crime?
A. Yes, sir.
Q. What were you charged with?
A. Whiskey.
Q. How many times have you been charged with it?
A. Just once.
Q. What did they do with you then?
A. Sent me for two years to the house of correction at Detroit.
Q. Have you ever been charged with anything else up in the Nation?
A. No, sir.
Q. Are you a citizen up there?
A. Yes, sir; a citizen by blood.
Q. Have you ever been charged with any crime in your own court?
A. No, sir.
Q. Never was in a Cherokee court at all?
A. No, sir.
Q. Have you ever been up in the Cherokee court for anything?
A. Nothing only as a juror or witness.
Q. Never charged with any crime?
A. No, sir.
Q. You never saw this man but once before you came down here?
A. I saw him twice.
Q. You saw him on that evening, and then the next day?
A. Yes, sir.
Q. You saw him first setting on the wagon tongue?
A. Yes, sir.
Q. How far were you away from him then?

A. I suppose I was about the length of the wagon. I never measured the wagon to see how long it was.

Q. How long was the length of the wagon?

A. I could not tell.

80 Q. Give me an idea?

A. Well, it was just the length of the wagon.

Q. Did you speak to the man?

A. I nodded my head to him.

Q. To the defendant?

A. Yes, sir.

Q. Did he stop and talk to you?

A. He looked kind of that way (indicating).

Q. What kind of a hat did he have on?

A. Could not swear.

Q. What kind of a coat did he have on?

A. He had on a dark looking coat.

Q. Black or blue?

A. I could not tell whether it was black or blue or brown.

Q. You know now what it was made of?

A. I could not swear what it was made of.

Q. Were you as close to him as you were to this man that is missing?

A. No, sir; I could have reached out my hand and put it on his head; he was right at me.

Q. Did he have on a broad brimmed or a narrow brimed hat, the defendant?

A. It looked to be a hat broader than that (indicating).

Q. How did he wear his hat?

A. He wore it on his head.

Q. Now, did he have it on his head or on his feet? How did he have it on?

(Witness indicates by placing his own hat well over his head.)

Q. Setting on the wagon tongue?

A. Yes, sir; whittling, looking down.

Q. You never said a word to him?

A. I just nodded my head.

Q. He never said a word to you?

A. No, sir; I don't believe he spoke.

Q. When you nodded to each other you passed on?

81 A. I never saw him nod his head.

Q. You don't know whether he looked up or not?

A. Yes, sir; he looked up in this way.

Q. You saw the color of his eyes?

A. Yes, sir.

Q. You know them to this day?

A. Yes, sir.

Q. Did you ever see any man that looked like him with black eyes?

A. I have seen lots of black-eyed people in the world, and lotts of blue eyed people, too. All men haven't got the same looks out of their eyes.

Q. You never saw him before, and yet you swear this is the very identical man you saw a setting on the tongue?

A. Yes, sir.

Q. There is no possibility of your being mistaken?
A. I do not think there is.
Q. You don't know his name, or didn't, then?
A. No, sir.
Q. Never had any conversation with him?
A. No, sir.
Q. Never knew him before?
A. No, sir.
Q. Never saw him before?
A. No, sir.
Q. Never had a word from him?
A. No, sir; not that I remember of.
Q. He had a broad brimed hat like yours, and pulled down as you have indicated?
A. Yes, sir.
Q. You passed on; and that is the only way now you can say you recognize him?
A. Just by his eyes and his complection.
Q. You never saw a man with a complection like his before, did you, dark complected man with black whiskers?
A. I guess there are lots of people with black whiskers and hair.
Q. You are willing to swear this is the man?
A. Yes, sir; I am confident this is the man I saw.
82 Q. You passed on and went on to your home. You saw the woman there, and you say you noticed her hair, too?
A. Yes, sir.
Q. How close was she to you?
A. I suppose she was about 6 or 8 feet.
Q. Did she speak?
A. I think she did.
Q. What did she say?
A. She said something about the children.
Q. What did she say?
A. She told it it had better come back from the horses.
Q. Tell me her language?
A. She talked English.
Q. What were her words? What did she say?
A. I could not talk like her; I have not got a woman's voice.
Q. If she said, "Come back" you can say that; if she said, "Go on" you can say that. Tell me what she said?
A. She told the child to come back.
Q. What did she call it?
A. She didn't call it nothing. She said, "You had better come back here, and get away from those horses."
Q. You swear she did that?
A. Yes, sir.
Q. Three years ago, a strange woman in a strange country, passing through there, and nothing to call your attention to it. You swear now she said, "You had better come back from those horses?"
A. Yes, sir.
Q. Is that all you heard her say?

A. Yes, sir.
Q. Was she looking towards you or towards the child at that time?
A. She looked at the child first, and then cast her eyes up at me.
Q. What were you doing at the time?
A. I was setting on the horse.
Q. Which way were you looking?
A. I was looking at the woman.
83 Q. How long was this before this man had spoken to you or you to him?
A. I was talking to this man at the same time and looking at her.
Q. What color of hair did she have?
A. Tolerable light hair.
Q. Thin or heavy?
A. Tolerable heavy.
Q. What size woman was she?
A. She was a tolerable good size woman; heavy set.
Q. How tall?
A. I could not say just how tall she was.
Q. How old was the child?
A. The child was about 3 or 4 or, maybe, 5 years old.
Q. Was it a girl?
A. It had dresses on; I guess it was a girl.
Q. How many children did you see there?
A. I only saw one child.
Q. How many did you see the next morning?
A. I only saw one the next day.
Q. You saw everything that was in the hack the next morning?
A. I don't know whether I saw everything that was in the hack or not; there might have been one thousand people in there for all I know.
Q. Do you swear to that?
A. No, sir; I say there might have been. There might have been some more people in there for all I know.
Q. You swore just now there might have been a thousand.
A. I didn't swear that; I just said there might have been.
Q. How big was that hack?
A. It was a good-sized hack.
Q. Was it open at both ends?
A. No, sir; it appears to me like it was closed up at the back end.
Q. Was it or not?
A. I could not swear positively whether it was or not.
Q. What kind of a dress did that woman have on?
84 A. I could not swear to that, either.
Q. What kind of a bonnet did she have on?
A. I don't think she had any bonnet on at all.
Q. Do you know whether she had or not?
A. No, sir; I think she was bare-headed.
Q. How near do you know it?
The DISTRICT ATTORNEY. I do not think that is a proper question to ask the witness.
(Question withdrawn.)

Mr. MARMON (of counsel for defense). You remember the color of her hair, and you remember the color of her eyes, and you remember the color of the jacket that was worn by the parties who were there—of the one that was missing?

A. Yes, sir.

Q. You remember the color of his eyes, of his hair; now tell me what kind of clothes this woman wore?

A. I never paid any attention to the woman—as close attention as I did to the man, because the man was standing right by me, and I could look at him.

Q. Do you know the color of the clothes that he wore?

A. I noticed that knit blouse.

Q. You have seen thousands of blouses?

A. Yes, sir.

Q. You have seen thousands of calico dresses and things of that kind?

A. Yes, sir.

Q. Now, what kind of a dress did she have on?

A. I would not swear to that.

Q. You never give it only a passing thought; you just passed on—nothing to attract your attention.

A. I just looked over at her when she spoke to the child.

Q. And there was nothing particular to atttract your attention
85 to the man, nothing to arouse your suspicions?

A. No, sir.

Q. It was just a meeting?

A. Yes, sir; it was just like a person meeting another off in the wilderness, I might say.

Q. You have met a great many persons that way, have you not?

A. I have met a few, not a great many. When I meet anybody on the road and talk to them I am supposed to know them afterwards.

Q. What did that man say?

A. I just asked him which way he was bound, and he said he was going to Oklahoma.

Q. What else did he say?

A. I said, "You are bound for some land?" and he said, "Yes; I thought I would go up there and look up some land." I says, "It is tolerable late; I had better go on. I have a good ways to ride to-night;" and I just rode off. After I rode off it was, I guess, 10 or 15 steps, I guess, to the water, and when I got to the water my pony drank, and I just turned myself in this way, and looked back at the parties; just looked around in that way.

Q. What was said?

A. Nothing was said. When the pony got through drinking I rode on up the hill.

Q. That was all that passed there?

A. Yes, sir.

Q. Did he say that he was going to Oklohoma?

A. I suppose he did; I asked him if he was bound for Oklohoma, and he said yes; he was going up there to look him up some land.

Q. You said just now he was bound for some land?

A. I told him that he was bound for some land, and he said yes.

Q. That is all the conversation you had with him?

A. Yes, sir.

Q. With regard to height; which was taller, this man or the other one?

A. I could not say, because this man was setting down.

Q. How tall was the other man?

86 A. He looked to be about 5 feet 11, or maybe 6 feet; he was a tolerable tall man.

Q. Didn't you swear before the commissioner that he was not more than five feet and a half feet tall?

A. I don't know; I might have said five and a half.

Q. There is a great deal of difference between 6 and five and a half in a man's height?

A. I never measured him. I could not guess at your height now.

Q. If I was standing up you could tell whether I was 7 feet or six feet tall?

A. No, sir.

Q. Can you not tell whether I am five feet or six?

A. I can tell you are over five feet by myself, because I am over five feet, and I know you are taller man than I am.

Q. He was a heavy-set man?

A. Yes, sir: tolerable heavy-set man.

Q. Would weigh about 200 pounds, would he not?

A. I could not swear that he would weigh that. I didn't make any guess at his weight at that time at all, but just from the best of my knowledge now I do not think that he would weigh over 160 or 170 pounds.

Q. He was a rather slender man, was he not?

A. No, sir; he was tolerable heavy set. I am five feet six and I only weigh 133.

Q. You remember the color of this man's dress; you didn't pay any particular attention to him. You do not know how the defendant was dressed at all. You don't remember that?

A. No, sir.

Q. Do you remember how I was dressed when I cross-examined you before the commissioner last February?

A. I never paid particular attention to you, because I was here in town, and a heap of people here; I never noticed you. If I had met you across the river, on the road, I would have noticed you close, and I would have been able to swear to your clothes then.

87 Q. The day you saw these people did you see anybody else?

A. Nobody; only at Vian, in the little town.

Q. Who did you meet there?

A. I saw a heap of acquaintances.

Q. Who did you meet on the road?

A. I don't believe I met a soul on the road.

Q. Did you or not?

A. I don't believe I did; no, sir.

Q. Coming or going?

A. No, sir.

Q. Who did you meet the next day when you met this man?

A. I met this man the next day.

Q. Who else?

A. I met some darkies.

Q. Who were they?

A. There was some girls at Roach's. They came out to the road there; I suppose they were going to town.

Q. You spoke to them?

A. Yes, sir.

Q. How were they dressed?

A. One had on a red flower dress—an old dirty dress.

Q. What girl was that?

A. Kate Roach.

Q. What was the other's name?

A. I don't know that.

Q. How was she dressed?

A. She had on a tolerable dark looking dress.

Q. Who did you see the next day?

A. I don't know; I seen a good many people.

Q. Tell me one.

A. I saw several people there in Braggs. I lived right there in Braggs; I don't know, as I rode out next day to see who all I could see.

Q. You saw some parties there?

A. I saw Mr. Madden and Patrick, storekeepers, there in Braggs.

Q. How was Madden dressed that day?

A. He generally wears——

88 Q. He generally wears—that is all right—how was he dressed that day?

A. He had on a white shirt on with a tie.

Q. A white tie in February?

A. Yes, sir; it was a light-looking tie; I would not say it was a right white tie.

Q. Was it tied up like mine?

A. I don't know how it was tied.

Q. Did you speak to this man the next day when you met him?

A. I don't think I did; I might have nodded my head to him. There is an old road turned up went and went a little west, and I turned out of his way, and he came around this way.

Q. How far were you away from him?

A. Not as far as from here to you.

Q. What did he have on?

A. He had his clothes on.

Q. Did he have on just his pants?

A. He had on dark-looking clothes.

Q. Did he have a coat on?

A. Yes, sir.

Q. Same one you had seen him have on the evening before?

A. Yes, sir.

Q. Was his dress changed in any way?

A. No, sir; not that I remember of.

Q. You noticed him, of course?

A. I knew it was the same party by the old hack. When I saw him coming in 100 yards off I said to myself: "That is the same hack I saw yesterday evening."

Q. They were all setting up in front, were they not?

A. Yes, sir; the man and his wife and the little girl.

Q. Did you go by the same camp?

A. No, sir; I never had any business over that far.

Q. How far did you say it was—7 or 8 miles?

A. Yes, sir; I only live four miles and a half from Braggs.

Q. How long before you were back by the camp again after
89 you passed there the evening you saw the parties there?

A. Well, sir, it may have been a year; I could not swear positively when it was.

A. How long after you saw these parties there until they found these bones, skeleton?

A. I could not swear how long it was; it seems to me like it was a month or two; three or four weeks or a month, or maybe two months; I could not swear positively.

Q. Didn't you say before the commissioner it was about 2 or 3 weeks?

A. Yes, sir; two or three weeks; I think I said that.

Q. How is it you say now a month or two, or two or three months now; you have been talking to other witnesses about this matter, haven't you?

A. No, sir.

Q. Posting yourself as to dates?

A. No, sir; I am swearing just what I believe about it myself.

Q. Haven't you talked with these other witnesses, and heard them say it was two or three months afterwards?

A. It don't seem to me like it was so long, but——

Q. Didn't you say this before the commissioner: "The body was found about two weeks after this;" that is, after you met the party? Here what you said altogether: "He had on a knit jacket. * * * The next morning I went to Braggs. As I came back I seen the same parties; there was one man missing, the man that was leading the horse, the blue-eyed man. The defendant then had the horses and hack. The defendant and the other man were the only persons camped there. I was 30 feet from the defendant when I passed." You said just now 30 yards. "I was 30 feet from the defendant when I passed, and the body was found about 2 weeks after this." Didn't you swear to that?

A. I might have swore to it; I am not positive.

90 Q. Can you swear positively to what you are saying now?

A. I could not say positively how long it was.

Q. Can you swear positively you were 30 feet from the defendant?

A. I can not swear just the number of feet; he was setting on the wagon tongue and I was in the road. If I was to go and measure it I could tell you just how far it was. I could not swear whether it was 30 feet or 20 feet or 2 feet.

Q. What do you guess the distance to be now?

A. About 25 or 30 feet, I guess.

Q. I believe you have said already that you never saw this defendant until you saw him there on this wagon tongue, and that you never saw him after you met him on that road the next morning until you were before the commissioner?

A. No, sir.

Redirect examination by the DISTRICT ATTORNEY:

Q. Have you ever seen the woman since?

A. Yes, sir; I saw her to-day in the hall.

Q. Do you take her to be the same woman?

A. I would not swear positively she was the same woman, but she looks very much like the same woman to me.

Q. Do you know whether the defendant's wife here is the woman you saw in the hall to-day?

A. I don't know for certain.

Q. Please state if she was pointed out to you as his wife?

A. Yes, sir; Mrs. Buckskin said to me as she passed me, "That is his wife right there now."

91 Q. You looked at her and you took her to be the same woman, you saw in the camp?

A. Yes, sir.

Recross-examination:

By Mr. N. L. MARMON. She has been around with the witnesses all the time, has she not?

A. I don't think she has.

Q. You could not swear you would have known her as the one you saw up here?

A. I never saw her here before.

Q. How long have you been here?

A. I have been here a couple of weeks.

Q. You have been about the court-house all the time?

A. Yes, sir.

Q. Don't you know that Mrs. Waters, or Mrs. Buckskin, has seen that woman here; don't you know she has been around here?

A. No, sir; I don't believe she has ever saw her before here.

Q. Have you seen her since she has been here before?

A. No, sir.

Q. Would you have recognized her as being the same woman?

A. No, sir; I don't believe I would the way she is dressed; she had on clean clothes to-day and a hat on.

Q. Did she have on dirty clothes before?

A. I suppose her clothes were dirty; they looked tolerable dark; I noticed her dress this evening; she had on a tolerable new black dress.

Q. What kind of a dress did she have on up there?

A. I could not tell you.

Q. How do you know whether it was dirty or whether it was clean dress just put on?

A. I knew she wasn't dressed up that day; she just had on common clothes.

92 Q. You can not tell me the color of that, whether it was a white dress that was dirty or whether it was a yellow dress that was dirty, or red dress or black dress, or anything of that kind, can you?

A. No, sir.

Q. What time were you sent off from here to Detroit; do you remember?

A. In 1882.

Q. For how long were you sent?
A. Two years.
Q. You forfeited your bond once, didn't you?
A. I never was out on bond.
Q. Were you here in 1873?
A. No, sir; it was 1882; I came back in 1884.

93 JOHN WATERS, having been duly sworn upon behalf of the Government, was examined by the district attorney, and testified as follows, to wit:

Question. Were you before the commissioner here?
Answer. Yes, sir.
Q. Where do you live?
A. At Vian.
Q. You are a son of George Waters, a witness here?
A. Yes, sir.
Q. Do you know the defendant in this case?
A. Yes, sir.
Q. Where did you first see him?
A. He came there to my father's house.
Q. When?
A. In 1889.
Q. Was there anybody with him?
A. There was another man with him.
Q. Do you know whether he had his wife and any children with him; did you ever see them?
A. Yes, sir; he had a woman with him.
Q. Did you see her at that time?
A. A No, sir; I passed the house where they were camped, and I saw them in the house.
Q. Where was that you passed the house?
A. Down on the Gurdy place, on Little Vian.
Q. You saw the woman there?
A. Yes, sir.
Q. Did you see any children?
A. I believe I saw one there.
Q. You didn't go in?
A. No, sir; I didn't stop; I just passed on.
Q. You say that the defendant and another man came there; how long did they stay there?
A. They staid about 10 days working for my pa.
Q. What were they doing?
A. Making rails.
94 Q. Both of them?
A. Yes, sir.
Q. When did you next see the defendant?
A. In 1892.
Q. Where?
A. He came over there at my house again.
Q. Was it the same man, this defendant?
A. Yes, sir.

Q. How long did he stay there that time?
A. He staid there four or five days, maybe three or four.
Q. Then what became of him?
A. He went on down in the river bottom.
Q. How long after that was it before he was arrested?
A. About a month.
Q. Did you go up and see the things that were dug up; did you go up to Illinois at McDaniel's place to see them?
A. No, sir; I never saw them.
Q. How much were you with the defendant and this strange man while they were there?
A. I saw him every day that he came there at the house.
Q. Did you know their names then?
A. Yes, sir; I knew both of their names when they first came there.
Q. What were their names? Did you know the other man's name?
A. I did then.
Q. Do you now?
A. No, sir.
Q. Were you asked what it was before the grand jury?
A. No, sir.
Q. You could not have told them if you had been asked?
A. No, sir.
Q. Do you remember the defendant's name?
A. Yes, sir.
Q. What name did he go by at that time, when he first came there?
A. John Graves is the name that he went by.
Q. You have forgotten the other man's name?
A. Yes, sir.
95 Q. How often did you see him?
A. About half a dozen times.
Q. Do you remember the kind of boots that the deceased wore?
A. Yes, sir; he wore heavy oil grain boots, high top.
Q. Did you notice any cuts about them; anything of that kind?
A. Yes, sir; there were a few cuts along here on this part [indicating on front part of boot].
Q. Look at the boots I now hand you and state if they are the same ones?
A. Yes, sir; they are like the boots.
Q. These have cuts on them here?
A. Yes, sir.
Q. These were in the boots when he wore them at your house, were they?
A. Yes, sir; they were not in the boots when he first came there. Three or four days after he came there he cut them holes in them.
Q. What did he do that for; do you know?
A. I don't know.
Q. Did you see the things that were brought back to McDaniel's house, the things that were dug up with the body, his skull and these things?
A. I saw the skull after it was brought down here.
Q. You didn't go up and look at the clothing and things?
A. No, sir.

Q. Are you certain that this defendant is the man that was there at your house?

A. Yes, sir.

Q. Have you ever seen the other man since?

A. No, sir.

Q. When did you next see the defendant?

A. In 1892.

Q. How did he come that time?

A. He come in an ox wagon.

Q. Did he have anybody with him?

A. Yes, sir.

Q. Did he have any women with him?

A. Yes, sir.

Q. Who was it?

A. His wife, I suppose.

Q. Any children?

A. Yes, sir; two children.

96 Q. Do you know how many children they had there at the house when they were there the first time?

A. No, sir.

Q. Did you ever see them?

A. No, sir; I was just passing the house and saw the woman.

Cross-examination by Mr. C. J. FREDERICK:

Q. You could not be mistaken about this being the man that was there at your house in 1889?

A. No, sir.

Q. You are sure of that?

A. Yes, sir.

Q. You never make mistakes as to the identity of persons. If you ever see a man once you always know him again?

A. Yes, sir.

Q. You never made a mistake of one man for another man?

A. No, sir.

Q. He told you when he was there first his name was John Grave, did he not?

A. Yes, sir.

Q. He told your father that, did he not?

A. I don't know what he told him.

Q. You called him Graves in your father's presence?

A. Yes, sir.

Q. And in your mother's presence?

A. Yes, sir.

Q. She knew his name was Graves, did she not?

A. I reckon she did.

Q. What was the other fellow's name?

A. I don't know his name.

Q. Why?

A. Because I have forgotten his name.

Q. Was it such a curious name?

A. I reckon so.

Q. You have got some idea about what kind of a name it was?

A. I don't know; I have no idea about it.
Q. Do you know his first name?
A. No, sir.
97 Q. What was this man's name, you say?
A. John Graves.
Q. You have got all of his name, and you have not got any of the other man's name?
A. Yes, sir.
Q. You have not no recollection at all of what his name was like?
A. No, sir.
Q. And you were with the other man a heap the most, wasn't you?
A. No, sir: I talked with the other man.
Q. He was a talkative man, was he not. Good, sociable, clever kind of a man?
A. Yes, sir; he talked a good deal; I never did talk to him much.
Q. Graves never did talk to you much, did he?
A. Yes, sir; he talked as much as the other.
Q. You didn't talk with either one of them much, did you?
A. No, sir.
Q. You didn't work with them, did you?
A. No, sir.
Q. Were you out where they were?
A. Yes, sir; I went out there with Pa one morning where they were making rails.
Q. You were not down where they lived at the house?
A. No, sir.
Q. Did you go and let them have some corn?
A. I let them have some corn once.
Q. How much corn did you let them have?
A. I believe I let them have a bushel.
Q. How much did you let them have any other time?
A. I didn't let them have any more.
Q. Your Pa did?
A. I don't know how much he let them have.
Q. Did they pay you for the corn you let them have?
A. They paid in making rails.
Q. You let them have the corn out of your father's crib?
98 A. Yes, sir.
Q. You didn't let them have your own corn?
A. No, sir.
Q. You are married now, are you not?
A. Yes, sir.
Q. You were not then?
A. No, sir.
Q. How old are you, John?
A. I am 20.
Q. You were about 17 then. You would recognize a girl more readily then than you would a man about those days?
A. I expect so.
Q. How much would this young man weigh that was with Graves?

A. I never saw him weighed; I reckon he would weigh about 170 or 180 pounds.
Q. How tall was he?
A. I don't know how tall he was.
Q. Was he as tall as I am?
A. I expect he was a little taller than that.
Q. Was he about as heavy as I am, or would be quite so heavy?
A. Yes, sir; I expect he was heavier than you are.
Q. What was his complection?
A. Red complection, some like you.
Q. Didn't he favor me right smart?
A. He had red complection.
Q. Was his hair about the color of mine?
A. His hair was darker than mine.
Q. What was the color of his mustache?
A. It was kind of dark.
Q. Was it as dark as mine?
A. It was darker than yours.
Q. Did he have as much mustache as I have got?
A. No, sir.
Q. Did he have as much as you have got?
A. Yes, sir; he had more than I have got.
Q. His mustache was long enough to comb a little, and yours is not?
A. Yes, sir.
Q. I suppose his mustache was about as long as that gentleman over there (referring to Mr. Rutherford), was it not?
A. Yes, sir.
Q. Which one did the work, Graves or the other man? You didn't see them making rails, did you? You don't know which one did
99 the work in making rails?
A. They were both working that morning I was out there.
Q. Which was doing the job?
A. They were mauling then on a log, making rails.
Q. They were both mauling away?
A. Yes, sir.
Q. You never did talk with either one of them yourself, I believe you say?
A. I talked to them a little when I let them have the corn.
Q. Were they both together when you let them have the corn?
A. Yes, sir.
Q. How long were you with them then?
A. Four or five minutes.
Q. That is the only time you ever talked with them yourself?
A. Yes, sir.
Q. What were you doing the other 6 or 7 days they were there?
A. I wasn't doing anything much.
Q. Didn't you go to school up to Tahlequah about that time?
A. No, sir.
Q. Where did you go to school?
A. I had went to school that fall before, but I hadn't gone back that winter.

Q. What were you doing at home?

A. I wasn't doing anything, only loafing around, doing work around the place.

Q. About what number of boots or shoes did this large red complected man wear?

A. About 8 or 9.

Q. What kind of a hat did he wear?

A. I don't recollect what kind of a hat he wore.

Q. Do you recollect the color?

A. I don't recollect what color.

Q. Did he wear a hat at all?

A. Yes, sir.

100 Q. Did Graves wear a hat or cap?

A. I don't know whether he wore a hat or a cap.

Q. What sort of boots did Graves wear?

A. He wore a pair of boots like that (referring to boots introduced in evidence).

Q. They both had boots alike, did they?

A. Yes, sir.

Q. Were the boots new when they came there?

A. Yes, sir; they were new, hadn't been worn much.

Q. You say that this man had cut holes in his boots after he had been there three or four days?

A. Yes, sir. I reckon he cut them after three or four days; they were not cut when he first came.

Q. You didn't see him cut them?

A. No, sir.

Q. How do you know this man Graves is the man that was there?

A. Because I know it.

Q. Tell this jury why you think this is the same man.

A. Because I think he is the same man.

Q. You are sure of it?

A. Yes, sir; I am sure of it.

Q. Tell the jury what makes you sure of it?

A. His complection and his hair, and his eyes and his looks.

Q. Did you ever see anybody with hair the color of his?

A. Yes, sir.

Q. You have seen plenty of people with that color of hair?

A. Yes, sir.

Q. You have seen plenty of people with black eyes and dark complection?

A. Yes, sir.

Q. Did you ever see anybody that looked like him?

A. No, sir.

Q. Did you ever see anybody that resembled him?

A. No, sir.

Q. You do not know what kind of a coat Graves had on then?

A. He wore a knit blouse.

101 Q. What did the young man have on?

A. He wore a knit blouse.

Q. Look like they came out of the same box?

A. I reckon they did; they were both alike.
Q. They wore coats, too, did they not?
A. Yes, sir.
Q. What kind of coats did they wear?
A. I believe they wore brown looking coats, jeans.
Q. Were the coats alike?
A. I don't remember now whether they were alike or not.
Q. Were the coats the same make of coats?
A. I don't remember.
Q. Did they have overcoats?
A. I didn't see any overcoats.
Q. What sort of pants did they wear?
A. Overalls.
Q. Both overalls?
A. Yes, sir; I think that is what they wore.
Q. They didn't wear their overalls in their boot legs?
A. Yes, sir; stuck down in there.
Q. Stuck down in their boot legs?
A. Yes, sir.
Q. What was the color of these knit blouses they wore?
A. They were brown with red stitching around them.
Q. Were you at home last Christmas when Graves came back there?
A. No, sir; I wasn't there when he came. I was there when he moved over there to make the rails.
Q. Did you see him Christmas day?
A. No, sir.
Q. You knew him when you saw him?
A. Yes, sir.
Q. Did he learn your name when he was there at work at first, when he staid there 8 or 10 days?
A. I don't know.
Q. Didn't your father and your mother call you John?
A. Yes, sir.
Q. Didn't he call you John when he was there?
A. I don't remember whether he called me John or not.
102 Q. I expect, may be, he called you Mr. Waters?
A. I do n't know.
Q. When he came back he knew you and called you Mr. Waters?
A. No, sir; did n't speak to me.
Q. You always had been friendly with him?
A. Yes, sir.
Q. Came back after three years and did not speak to you?
A. No, sir.
Q. Didn't he speak to you at all when he was there?
A. No, sir.
Q. Didn't you speak to him?
A. No, sir.
Q. Didn't you say to him, "How are you, John Graves?"
A. No, sir.
Q. Didn't speak to him at all?
A. No, sir.

Q. Are you sure you knew that was the same man?
A. Yes, sir.
Q. Didn't you know it more from the fact that some one had been found up there dead than any other way? Is n't that what makes you know it? If there had n't been some man found dead up there, and that they suspected that Graves had something to do with it, you would never have known him?
A. Yes, sir; I would have known him anyhow.
Q. You knew the man and didn't speak to him? Did he speak to your father?
A. I reckon he did; I was n't there when he first came.
Q. Did you see him talking to your father?
A. No, sir.
Q. Did you ever see him talking with your mother?
A. Yes, sir.
Q. Did he know her when he came there?
A. I do n't know.
Q. Did he speak to her and call her Mrs. Waters?
A. I was not there when he came.
Q. At any time when he was there?
A. I reckon they did; they were out to the gate.
Q. When he was there at first, when he s'aid there 8 or 10 days in 1889, did you see him talking with your mother any time
103 during that time?
A. Yes, sir.
Q. What would he call your father?
A. Mr. Waters.
Q. What would your father call him?
A. Mr. Graves, I guess.
Q. What would the other young man? He talked to your father and mother both. What would he call your mother?
A. Mrs. Waters, I guess.
Q. What would he call your father?
A. Mr. Waters.
Q. What would your father call him?
A. I do n't know what he called him.

104 C. S. PALMER, having been duly sworn upon behalf of the Government, was examined by the district attorney, and testified as follows, to wit:

Question. Were you before the commissioner?
A. Yes, sir.
Q. Were you before the grand jury?
A. Yes, sir.
Q. Where do you live?
A. I live at Vian.
Q. Do you know John Graves, this defendant here?
A. Yes, sir.
Q. Where was the first time that you ever saw him?
A. He was at my house.

Q. When?

A. It was sometime along in the first of February.

Q. Of what year?

A. I reckon it was in 1889; it has been over three years ago.

Q. Was there anybody with him?

A. Yes, sir; there was a young man with him.

Q. Do you know his name?

A. No, sir; I do not.

Q. What kind of a looking young man was he?

A. He was a tolerable large man; he was a man that would weigh about 180 pounds, maybe 200 pounds; he was a mighty stout, portly-looking fellow; I suppose 25 or 26 years old; red complected, blue eyes, as well as I recollect.

Q. Do you remember anything about his teeth, or do you know that?

A. No, sir; I do n't recollect anything about that.

Q. What were they at your house for?

A. They came there to buy hay, the young man, for his team.

Q. Was he claiming the team as his?

A. Yes, sir.

Q. What kind of a team did he have?

A. He had a span of horses.

105 Q. What kind of a vehicle?

A. An old hack.

Q. Did they have the hack with them?

A. No, sir.

Q. The two were together?

A. Yes, sir.

Q. How were they, on foot or horseback?

A. They were on foot.

Q. Did you see the horses afterwards?

A. Yes, sir; when I first saw the horses—well, I won't be certain—I was over to their camp.

Q. Where was that?

A. That was east of me about a mile?

Q. On any creek?

A. Yes, sir; on a little branch east of me.

Q. What was it they called it?

A. I don't know that. I do not know that there is any name for it.

Q. How far is it from Little Vian?

A. It is 2 miles.

Q. Were they camped two miles from Little Vian?

A. Yes, sir; I reckon they were, somewheres near that.

Q. How far from Big Vian?

A. It is somewheres near three miles.

Q. When was that, now, they were camped there?

A. It was along about the first of February?

Q. Was it the time they were making rails for Mr. Waters or before?

A. It was before. I was going around, just walking around, and there was snow on the ground, about 6 inch snow, and I noticed a camp out there, and I walked out to it, and there was a lady and a couple of children there, and she said her husband had gone to the bottom to get a job of rails, or a job of work of some kind.

Q. How long was that before this man came to your house to get hay?
A. I forget whether it was that same evening or the next day.
Q. Did you notice their horses at the camp?
A. No, sir; I do not recollect whether I saw them or not.
Q. When did you see them?
106 A. When they were moving; *when they were moving;* when they were going on to Mr. Buckskin's to make rails.
Q. After you had been to this camp, and saw the woman and the two children, then the next day you think these two men came to your house to buy hay; did they get any hay?
A. No, sir; I sent them to Mr. Jack Martin's.
Q. How long were they at your house?
A. They were there quite a bit; my wife's brother was there.
Q. Do you remember their names; did you hear their names spoken?
A. No, sir; if they told their names I have forgotten it.
Q. You were before the grand jury, were you?
A. Yes, sir.
Q. Were you asked the name of the deceased there?
A. Yes, sir; I think I was.
Q. Did you tell them you didn't know?
A. Yes, sir.
Q. You say you saw the woman down in the camp; have you seen her since?
A. Yes, sir; I saw her up here in a little house up by Mr. Waters' in the Territory when they came back.
Q. Have you seen her here since this court commenced?
A. No, sir.
Q. When did you next see the woman and where?
A. Not until they came back. I suppose I might have seen her pass along the road?
Q. When they came back; when was that?
A. It was along about Christmas.
Q. Of what year?
A. This last Christmas.
Q. Was that the same woman?
A. Yes, sir; I think it is.
Q. You took her to be the same woman?
A. Yes, sir; to the best of my knowledge it is the same woman and children.
Q. You saw the same woman with the defendant when he came back last Christmas?
107 A. Mr. Graves was out in the woods making rails; she was at the house where she was living.
Q. How many times did you see this defendant when he was there three years ago?
A. I only saw him the one time; as he was moving off was the second time, but he was 150 or 200 yards from me.
Q. Do you take this to be the same man?
A. Yes, sir; to the best of my knowledge this is the same man.
Q. You saw them one time when he was at your house to buy hay; you saw them as they rode passed moving to Water's when they went there to make rails?

A. Yes, sir.

Q. Did you see the woman more than the one time?

A. No, sir.

Q. The next time you saw them was when they came back last Christmas, nearly three years afterwards?

A. Yes, sir.

Q. You take these parties to be the same?

A. Yes, sir; I do.

Q. When they came back how did they come this last time?

A. I don't know, sir.

Q. Did you see them with an ox team at any time there?

A. No, sir; I saw an ox team there I supposed was theirs; I didn't see them come up.

Q. Do you remember the kind of boots that was worn by the young man?

A. Yes, sir.

Q. What kind were they?

A. They were large high-topped boots, oil tanned.

Q. Look at these [handing witness boots heretofore introduced in evidence].

A. They look like the boots; they do not look as large, but then they have drawn up.

Q. They have been out in the weather.

A. Yes, sir.

Q. You say that he is the same man that was there with the young man at your house?

A. Yes, sir; he is.

108 Cross-examination by Mr. C. J. FREDERICK:

Q. The first time you saw this defendant, you say, was about the first of February, three years ago?

A. Yes, sir; somewheres along about that time.

Q. You saw him and another young man, red complection, blue-eyed young man, about 25 years of age, and would weigh about 200 pounds.

A. Yes, sir; 180 or 200 pounds; somewheres along there.

Q. You didn't learn the names of either one of the men?

A. No, sir; if I did I have forgotten it.

Q. They came to your house to buy hay?

A. Yes, sir.

Q. That is the only time you saw them at that time?

A. Yes, sir.

Q. Did you see them any more during that month or that year?

A. No, sir.

Q. You just saw them the day they came to buy hay at your house?

A. Yes, sir.

Q. How long did they stay there?

A. They staid there quite a bit, probably an hour. What made them stay longer than they would have staid George Thompson was there, and Mr. Graves got to talking about being in Colorado, and he was just from Colorado on a visit, and that raised a right considerable of a chat among him and Graves. Him and Graves was chatting, and me and the other fellow.

Q. You call him Graves now; they didn't call him Graves then?
A. No, sir; they didn't. I don't know what his name was.
Q. At any rate, the man who was talking said he had been to Colorado, and that man you take to be this man?
A. Yes, sir.
109 Q. You are sure this is the man that was talking and said he had been to Colorado?
A. I am pretty sure.
Q. You are pretty sure, but you are not sure.
A. Yes, sir.
Q. Could you be mistaken about it?
A. I don't think I could.
Q. You think this is the man that was talking about having been to Colorado?
A. Yes, sir.
Q. Where is George Thompson?
A. He is in Colorado. If he was told his name he would know it.
Q. How long has he been there?
A. 2 years I suppose.
Q. Did George Thompson learn Grave's name then?
A. I don't know.
Q. Did the other man talk like he had been to Colorado too?
A. I don't know whether he did or not; he didn't while he was talking to me. All his talk to me was about his family; that he was looking out him a location, and then he was either going to send for his family or go after them, and he was moving Mr. Graves.
Q. What sort of a family did he say he had?
A. He didn't say; he said his family was in Kansas.
Q. Did you understand from him that he had a wife and children?
A. Yes, sir.
Q. And he was looking out for a location?
A. Yes, sir.
Q. When he got a location he was going to send for his family?
A. Yes, sir.
Q. He said he was moving Mr. Graves, did he?
A. Yes, sir; but he didn't call his name; he said he was moving the other man, and he told me that he picked him up somewhere on this side of the tunnel, but I don't remember the place that he picked him up at on the Frisco Railroad.
110 Q. Did he say what tunnel?
A. This tunnel on the Boston Mountains.
Q. Did he say that; did he say what tunnel?
A. Yes, sir; he said the tunnel at the Boston Mountains on the Frisco Railroad. There is not but the one tunnel on it between here and Fayetteville.
Q. There might be some other tunnels on that Frisco road; this young man had come from Kansas.
A. Yes, sir.
Q. Did you learn what part of Kansas?
A. No, sir; if I did I have forgotten.
Q. Did you learn from near what place in the State?

A. No, sir; if I did, I don't recollect.

Q. He just picked this man up. What was he going to do with this man?

A. I suppose——

Q. What did he say, if he said anything?

A. He just said he was moving this man and his wife and children.

Q. Where?

A. He didn't say where.

Q. You didn't ask him?

A. No, sir.

Q. Nor he did not say?

A. No, sir.

Q. This conversation was before he made the rails for Mr. Waters?

A. Yes, sir.

Q. I believe you call Mr. Waters, Buckskin?

A. Yes, sir.

Q. Is that the same man as Waters?

A. Yes, sir.

Q. There was six inches of snow on the ground?

A. Yes, sir; that was when I first went to their camp, and probably the snow might have been off by the time he went to George Waters's.

Q. You never had any conversation with them after the time you have mentioned?

A. No, sir; not until he came back.

Q. When he came back you knew him?

A. Yes, sir.

111 Q. Did he know you?

A. He said he did.

Q. Did he tell you that he did?

A. No, sir.

Q. He didn't come up to you and say, "I am glad to see you."

A. No, sir. I talked to Mr. Redding, and——.

Q. Where is Redding?

A. I don't know where he is; he is down in the river counties somewhere.

Q. In this State?

A. Yes, sir.

Q. How long has he been down there?

A. 8 or 9 months. He was up here making rails, him and Graves together, and he told me that he had been with Graves about three weeks.

Q. I am asking you what the defendant told you?

A. He never told me anything. He never let on that he ever saw me.

Q. Did you let on that you had ever seen him?

A. No, sir.

Q. You withheld from him recognition; didn't intimate to him that you knew him?

A. I knew him.

Q. Did you let on to him that you knew him?

A. No, sir.

Q. Were you sure that you knew him?

A. Yes, sir.

Q. Are you citizen up there?
A. No, sir; I am a citizen of the State.
Q. How long have you lived up there?
A. I have lived there three years last Christmas.
Q. Where did you come from?
A. Van Bren, Arkansas.
Q. How long did you live there?
9 years. I was from Benton County down there, and from Tennessee to Benton County.
Q. How old are you?
A. I will be 58 the tenth of next March.
Q. You never make a mistake in the identity of a person, I suppose; never mistake one man for another?
A. Not often; I do not.
112 Q. Do you ever?
A. I have at times in passing along see a person coming up to me, I would be mistaken in the man that was coming.
Q. Did you ever mistake a stranger for a man that you had not seen for quite awhile?
A. No, sir; I don't recollect that I ever did.
Q. What number boot did that man wear; that 25-year old, blue-eyed, light-complexion fellow?
A. I didn't ask him; I didn't examine the number.
Q. About what number?
A. I suppose about a 9; maybe a 10.
Q. Was he as large a man as I am?
A. Yes, sir; I suppose he was.
Q. He didn't have as big a foot as I have, did he?
A. Yes, sir; I guess he did. He was a more raw-boned man; he wasn't pussy like you.
Q. You think that he would weigh as much as 200 pounds?
A. I said betwixt 180 and 200 pounds. If he had had the flesh on him that you have, I think he probably would have weighed more—that is, he did not appear to be as big around as you are.
Q. He must have been about six *deet* tall?
A. Yes, sir; about six feet, I suppose.
Q. Why didn't you ask him his name?
A. That is a thing I hardly ever do.
Q. Were you before the grand jury?
A. Yes, sir.
Q. You did not tell the grand jury his name?
A. No, sir.
Q. Would you know his name if you would hear it called?
A. No, sir; I know I wouldn't if I heard it.
Q. How many others have been arrested and charged with this same offense?
113 A. None that I know of. I never heard of any other man being arrested and charged with this in my life.
Q. You can give us no reason why you didn't learn this other man's name?
A. I didn't learn either one of their names.

Q. When did you first learn this man's name was Graves?
A. Since he came back the last time.
Q. You never did learn the name until he came back the last time?
A. No, sir.

Redirect examination:

By the DISTRICT ATTORNEY. In the conversation you had there with the young man, you say that he said he had a family in Kansas?
A. Yes, sir.
Q. He was looking for a location, and when he got a location he proposed to get his family and take them there?
A. Yes, sir.
Q. Did he state the number of his family?
A. No, sir; if he did I have forgotten it.
Q. He said that he had picked up the defendant near the tunnel up here?
A. Yes, sir; somewheres on this side of the tunnel of the Frisco railroad.
Q. That is at Winslow?
A. Yes, sir.
Q. Did he say anything as to whether he brought his wife and family along with him, the defendant? Did he say anything about that family?
A. Yes, sir; he said he was moving this man Graves, him and his wife and two children.
Q. Had picked them up there near Winslow?
A. Yes, sir.
Q. He told you that he was moving this man that you now know to be Graves?
A. Yes, sir.
Mr. FREDERICK. Was your wife present at the conversation you had?
A. Yes, sir; she was at the house.

114 Mrs. C. S. PALMER, having been duly sworn upon behalf of the Government, was examined by the district attorney, and testified as follows, to wit:

Question. What is your first name?
A. Sarah C. Palmer.
Q. You are the wife of C. S. Palmer?
A. Yes, sir.
Q. Do you know this defendant, John Graves?
A. Yes, sir; his eyes looks familiar, and his complection very much.
Q. Where did you first see him?
A. At our house.
Q. When?
A. Three years ago, along about the first of February.
Q. Was there anybody with him?
A. Yes, sir.
Q. Who was with him?
A. It was a stranger; they were both strangers to our people.
Q. Do you remember their names?
A. I don't remember any of their names.

Q. You were before the grand jury, were you?
A. Yes, sir.
Q. Were you there asked the name of the deceased?
A. Yes, sir.
Q. You told them you didn't know it?
A. Yes, sir.
Q. What was the business of these two men at your house?
A. It was to get some hay to feed their horses.
Q. Did you know who owned the horse?
A. Yes, sir; the other man.
Q. The young man?
A. Yes, sir; the youngest man of the two—that is, he looked the youngest.
Q. How long did they stay at your house?
A. I could not tell you exactly, maybe half an hour or maybe longer.
Q. Did you hear any talk or conversation pass there?
A. Yes, sir; I heard them talk right smartly along.
Q. Did you hear either one of them say whereabouts they came from?
115 A. Yes, sir; the other man said that he came from Kansas, but I don't remember the town.
Q. Did he say anything about having a family?
A. Yes, sir; he told me that he had a family.
Q. Did he say anything about where he found this defendant?
A. Somewhere this side of the tunnel. I don't remember the name of the station, but it was this side of the tunnel.
Q. What tunnel?
A. It is through the Boston Mountains, up on the Frisco railroad.
Q. You say they stand there about half an hour?
A. I think it was about that; I would not be sure.
Q. Did you see the defendant's wife at that time?
A. No, sir; I never saw her until since I came here.
Q. You didn't see her when she was up there?
A. No, sir; my husband was at their camp, and he saw her himself.
Q. All the time you ever saw this defendant and that other man was during the time they were at your house?
A. Yes, sir; the other man was at my house one more time besides the first.
Q. Do you remember anything as to how his teeth were?
A. No, sir; I didn't pay any attention to that.
Q. Were you before the commissioner?
A. Yes, sir; I reckon so.
Q. How many times have you testified before this—twice or only once?
A. Twice, I reckon.
Q. This is the third time?
A. Yes, sir; I think this is the third time.
Q. Were you down here with your husband the first time that he came?
A. No, sir.
Q. It was before the grand jury you were, then, and not the commissioner.

116 Cross-examination:

By Mr. C. J. FREDERICK. You say that the defendant's eyes and complection look familiar to you?

A. Yes, sir.

Q. You saw him once and the other man twice?

A. Yes, sir; I only saw this defendant at a distance the second time.

Q. You heard the other man talk twice?

A. Yes, sir.

Q. This one did not have very much to say?

A. Him and my brother had right smart conversation; the defendant and my brother. My brother is not here.

Q That is Thompson?

A. Yes, sir.

Q. What time was it they came to your house?

A. I could not say the time, but it was right about the first of February. It was the time that the snow was on the ground; all the snow we had during that winter to amount to anything much—four or five or six inches deep, maybe more; I don't know how deep it was.

Q. What color horses did they have?

A. They were what I would call bays; they were over at the road, and that is the way they looked when the hack passed.

Q. What size man was the young man?

A. He was a tolerable large man.

Q. What size was the other man?

A. He was smaller; right smart smaller. I don't know just how much he would weigh; I do not know what either one would weigh.

Q. The younger man was the larger one?

A. Yes, sir; he was taller and heavier.

Q. Did you ask the young man his name?

A. No, sir; I just asked him if he was moving.

Q. Did you ask either one of them their names?

A. No, sir.

117 Q. Did you hear him talk what time he was there, some half an hour or three quarters? Was he talking the most of the time he was there—the young man?

A. A right smart of the time. He had some little conversation there in talking to me and to the other parties. I asked him where he was moving and he said he wasn't moving; he was just moving this family; that his own family was in K'nsas.

Q. Did he tell you what part of Kansas?

A. No, sir; I do not remember.

Q. Did you ask him the name of the family that he was moving?

A. No, sir.

Q. You had formerly lived in Crawford County?

A. Yes, sir; for about 9 years.

Q. You had acquaintances in that part of the State, had you not?

A. Up in Benton County.

Q. You had lived around in Crawford County?

A. Yes, sir; around Van Buren.

Q. When he told you that he picked these people up about the tunnel, you knew where that was?

A. Yes, sir; I have passed through there.
Q. You had acquaintances in that part of the country, didn't you?
A. No, sir; not right around about the tunnel I didn't.
Q. You didn't inquire the names of the party he was moving at the time he was at your house?
A. No, sir; I didn't.
Q. You asked no names at all?
A. No, sir.
Q. You say you never saw them any more?
A. No, sir.
Q. How far did you live from Mr. Buckskin's, or Waters?
A. I think they call it a mile and a half or a mile and three-quarters; not quite two miles.

118 Q. Do you know whether or not they had been working at Waters's before then?
A. They inquired for work and my husband told them that he was wanting some rails made, he thought, and that maybe they could get some work to do there when they came to our house. They said they wanted to get some work, and he told them there was work at Waters's.
Q. They were at your house before they went to Waters's, then?
A. Yes, sir.
Q. Did this man have a beard on his face then?
A. Yes, sir; but not so long as it is now.
Q. Did he have a beard all over his face, or was it shaved up and down on the chin like?
A. I don't think it was shaved much; it might have been shaved and grown out some.
Q. Was his beard half as long as it is now?
A. I suppose it was, maybe.

119 WILLIAM PALMER, having been duly sworn upon behalf of the Government, was examined by the district attorney, and testified as follows, to wit:

Question. Where do you live?
Answer. Vian.
Q. You are the son of the Mr. and Mrs. Palmer who have just been upon the witness stand?
A. Yes, sir.
Q. How old are you?
A. I will be 26 next birthday.
Q. Do you know this defendant?
A. Yes, sir.
Q. When did you first see him?
A. At my father's house.
Q. When was that?
A. I don't remember just when it was; some time in January.
Q. Of what year?
A. 1889, I believe.
Q. Was there anybody with him?
A. Yes, sir.

Q. You say in January, 1889; was it in the latter part or first part, or do you know?

A. I could not say.

Q. You have nothing to tell you when it was exactly?

A. No, sir.

Q. What were they at your father's house for?

A. They came there to buy some hay.

Q. How long were they there?

A. I could not say; may have been 20 minutes, or hardly so much, and maybe more; I could not say how long it was.

Q. While they were there did you hear them talk about where they came from? If you did, state what they said?

A. Well, some; yes, sir.

Q. What do you remember of their saying?

A. The young man said he was from Kansas, that he lived there
120 somewheres, I believe, and he said he come down there to look him out a location, and he said when he found a location he would either send for his family or go back after them, and I had quite a little talk with him myself.

Q. Did he say anything about the defendant, where he found him, where he run across him?

A. No; not that I heard.

Q. Did you learn there where the defendant came from?

A. Yes, sir.

Q. At that time?

A. Yes, sir. Where he came from down there?

Q. Yes, sir?

A. Yes, sir; I heard that he came from up about the tunnel there.

Q. Did you hear it at the time while the two were there?

A. I could not say whether I did or not?

Q. Did you see anything more of this defendant after that? Is that the only time you saw him, or did you see him again?

A. I saw him once more before he went away.

Q. Where did you see him that time?

A. I saw him in the road going to Vian.

Q. Was there anybody with him?

A. Yes, sir.

Q. Who?

A. This young man; he was going over towards Vian, and I was coming from—

Q. How were they going?

A. In a wagon.

Q. What kind of a wagon was that?

A. It was some kind of a spring wagon.

Q. How many horses?

A. Two.

Q. What kind of horses were they?

A. I taken them to be bays.

Q. Do you know whose horses they were?

A. I taken them to be the young man's horses.

Q. Why?

A. Because he came there after the feed for his team. That is why I allowed they were his.

121 Q. The defendant came too?

A. Yes, sir; he came with him.

Q. Was there anything else that made you think they were his horses, did either one of them say anything about as to whose horses they were?

A. No, sir; not that I heard.

Q. You met them going to Vian?

A. Yes, sir.

Q. Did you stop and talk to them?

A. No, sir.

Q. They passed on the road; did they have anybody else in the carriage?

A. Not that I remember.

Q. So that is twice you saw them?

A. Yes, sir.

Q. Is this defendant the man?

A. Yes, sir.

Q. State when you next saw the defendant?

A. I could not say exactly when it was.

Q. Did you see him any more until he came back?

A. No, sir.

Q. Did you see anything of his wife and children at the time?

A. No, sir.

Q. You did not see them?

A. No, sir.

Q. Do you remember of his saying anything, talking?

A. Yes, sir.

Q. What did he say?

A. I could not say what he said; him and my uncle had an argument about some railroad in Mexico.

Q. New Mexico?

A. I could not say which one of the Mexico's.

Q. Did you see the clothing after they were brought back?

A. No, sir; only the boots.

Q. What about the boots?

A. I didn't see them until I came here. I recognized the boots as being the boots that the man wore.

Q. You saw these boots down in my office?

A. Yes, sir.

Q. These are the boots, are they?

A. Yes, sir.

Q. These are the boots that you recognize as being the ones that he wore?

A. Yes, sir.

122 Q. Were you before the grand jury?

A. No, sir.

Q. This is the first time you have testified?

A. Yes, sir.

Q. Do you know the names of either one of these people—did you know the name of the deceased?

A. I heard his name—that is, Graves' name.
Q. When did you first learn the defendant's name?
A. After he came back there.
Q. Did you know the name of the young man that was killed up there?
A. No, sir.
Q. Have you ever heard his name mentioned?
A. If I am not mistaken he told me his name there, but I don't remember what it was.

Cross-examination by Mr. C. J. FREDERICK:

Q. Where did you hear the name of the young man?
A. At our house.
Q. What was it?
A. I don't know; I don't remember what it was.
Q. Was it a strange name?
A. I could not say.
Q. Would you know it if you would hear it called?
A. I could not say whether I would or not.
Q. Was it Smith?
A. I could not say.
Q. You would know it if you would hear it called?
A. I do not know that I would.
Q. It wasn't Jones?
A. I don't know that it was.
Q. You did hear the name, did you; he told you his name, did he?
A. If I am not mistaken he did.
Q. He told you where he was from?
123 A. Yes, sir; he told it there in the house.
Q. Didn't he say that they were both from Kansas?
A. No, sir; he did not; not that I heard.
Q. Did you hear him talk to your father, your father who testified here awhile ago?
A. Yes, sir; I reckon I did.
Q. Did you hear him tell your father they were from Kansas?
A. No, sir.
Q. If he did tell your father they were from Kansas you would have heard it?
A. Yes, sir; I reckon I would.
Q. Then you can state you did not hear him tell your father that?
A. I didn't hear him tell my father that they were from Kansas
Q. You say you recognize the boots?
A. Yes, sir.
Q. Why? How?
A. Because I examined them.
Q. When?
A. In our house.
Q. On his feet?
A. Yes, sir.
Q. Did you see me yesterday?
A. I think so.
Q. Do you recognize these shoes as the ones I had on yesterday?
A. I didn't look at them; I didn't examine them.

Q. Why did you examine the man's boots?

A. Because they were a goot boot, a large boot, and I just merely looked at them. They were very high, and I just merely looked at them. I asked him if they were shop-made boots.

Q. What did he say?

A. He said yes.

Q. Did you ask him where they were made?

A. Yes, sir; I think I did.

Q. Where did he tell you they were made?

A. Somewheres in Colorado.

124 Q. Did the other man, Graves, have on boots?

A. I could not say.

Q. You don't know whether he had on boots or not.

A. No, sir.

Q. Did he not have on high-top boots, too?

A. I could not say whether he did or not.

Q. What number, about, was this young man's boots?

A. I suppose they were number 8 or 9, maybe 10; I don't know; I didn't ask him the number.

Q. What size man was the man?

A. I don't know how large he was.

Q. Was he as large as I am?

A. I suppose he might have been; I do not know.

Q. I will ask you to tell us what you meant by saying that you recognized these boots?

A. Well, sir, I meant that I recognized them as being the boots that he had on at our house.

Q. That is what you meant; you meant that you recognized them as being the boots that the man had on at your house?

A. Yes, sir.

Q. Can you point out the point of resemblance or distinction about them?

A. They are stitched that way.

Q. Did you ever see any boots made that way before?

A. I might have saw them.

Q. Don't you think you recognize these as being a pair of boots like the ones that he had on?

A. I recognize them as being the ones that he had on.

Q. Can you say they are the ones that he had on?

A. To the best of my knowledge they are the boots.

Q. What number do you say this boot is?

A. If I looked and saw the number on them I might tell you.

Q. Can you tell the difference between a 10 and a 5?

A. The boots are laid out in the weather, and they are all drawed up.

125 Q. What number do you wear?

A. 7 and a half.

Q. We will measure this boot here with your shoe.

(Boot introduced heretofore in evidence is put by witness's boot, and found to be a little shorter.)

Q. This is a seven and a half you have got on.

A. Yes, sir.

Q. When you told me awhile ago that the man wore an 8 or 9 you misjudged the number, didn't you?

A. No, sir.

Q. Do you think this is a number 9?

A. It might be a number 9 or 10; I don't know.

Q. Do you still stick to it that this is the boot that the man had on?

A. Yes, sir.

Q. That is, the man that was at your house?

A. Yes, sir.

The DISTRICT ATTORNEY. Whatever the number he may have had you take this to be the boot?

A. Yes, sir.

By the COURT. Was the boot that he had on cut any part of it?

A. Not at the time he was at our house.

Mr. FREDERICK. At the time he was at your house was it cut at all?

A. Not that I saw.

Q. You did not see any cut on the boot?

A. No, sir.

Q. The young man said he was down there to look out a location and when he found one he would send for his family, or go and get them, or some thing that way?

A. Yes, sir.

Q. And he said that his boots were made in Colorado?

A. Yes, sir; that is what he said.

Q. He had them made, did he?

A. Yes, they were shop made.

Q. You asked him if they were shop-made boots?

A. Yes, sir.

Q. What place in Colorado did he say?

A. He told me, but I do not remember.

126 Q. Was it Denver?

A. I could not say whether it was or not.

Q. Was it Pueblo?

A. I could not say.

Q. It wasn't Trinidad?

A. I could not say.

Q. You do not know the name of the place where they were made?

A. I don't know whether I would know it or not.

Q. What kind of clothes did he have on?

A. Well, sir, he had on a knit blouse was one garment.

Q. What kind of clothes did this man have on?

A. I don't know; I could not tell you.

Q. What kind of a hat?

A. I could not say that.

Q. Did they wear hats or caps?

A. I think this young man had a cap on.

Q. What do you think about the defendant?

A. I don't know what kind of a hat he had on, or whether it was a hat or cap.

Q. What kind of a cap did the young man have on?

A. A fur cap I think, but I could not say; I could not say whether it was a cap with a brim to it coming around in front, or whether it run all around. I could not say positively what kind of a looking cap it was.

Q. Well, could you really tell whether it was a cloth cap or a fur cap?

A. No, sir; I could not tell positively whether it was a cap or not. I said I thought it was a cap.

Q. That is your best impression?

A. Yes, sir; that is my best knowledge.

Q. You will not be so sure about what kind of a cap?

A. No, sir.

Q. You think that the defendant wore a hat?

A. I would not say what he wore.

Q. Did they have on overcoats?

127 A. This man did not; I could not say whether Graves did or not, but the young man didn't.

Q. It was cold weather, was it not?

A. I think it was.

Q. Was there snow on the ground?

A. I could not say whether there was snow on the ground or not.

Q. Don't you know there was a 6-inch snow on the ground at that time?

A. I don't remember whether there was snow on the ground or not, but I have heard my father say there was.

Q. Do you get any more of this you have been telling from your father, about the boots, caps, and so forth?

A. No, sir.

Q. That is from your own personal knowledge?

A. Yes, sir.

Q. You do not know about the snow except what your father said?

A. No, sir.

Q. Isn't 6 inches of snow a common thing up in that country?

A. No, sir.

Q. Why do not you remember about that?

A. I can't remember whether the snow was on that day or whether it wasn't.

Q. The snow was on the ground more than one day, was it not?

A. I could not say; it might have been.

Q. Did this man have any beard on his face?

A. He had a mustache.

Q. Did the other man have any beard?

A. Very little, I think.

Q. Whereabouts did he wear his beard, what part of his face, the young man?

A. He had a mustache.

Q. How heavy? Was it as heavy as mine?

A. No, sir.

Q. Lighter mustache?

A. Yes, sir.

Q. Was it about like like yours?

A. I could not say; it might have been as large; maybe not hardly as large.

Q. Did this man have any beard?

A. He had a mustache only; he had beard, but——

128 Q. Did he wear it like he does *not*?

A. No, sir.

Q. Was it grown out any at all?

A. Yes, sir; just a little bit.

Q. Did it look as though the man had shaved regularly once a week, or something like that?

A. It looked like he had been shaved in about 2 weeks; it might have been longer, or hardly so long; I don't know how long his beard was.

Q. If he had beard on his face like we understand by full beard, of course you would have noticed it?

A. Yes, sir.

Q. Was this man's beard grown out so you could tell that he wore beard?

A. Yes, sir.

Q. It was grown out?

A. Yes, sir.

Q. To what length would you say?

A. I could not say to what length.

Q. After considering the whole matter now you still think this is the same man?

A. Yes, sir.

Q. You might be mistaken about it?

A. I think he is the same man.

Q. You could be mistaken about it could you not?

A. I don't know how that would be.

Q. You don't think you could be mistaken?

A. Of course, sometimes; the most of us are liable to be mistaken sometimes.

Q. Do you think this is one of the times you might be mistaken about it?

A. No, sir.

Redirect examination:

By the DISTRICT ATTORNEY. He was a stranger to you; you never saw him again until he came back there?

A. No, sir.

Q. Never did you any wrong or any harm?

A. No, sir.

129 Recross-examination by Mr. C. J. FREDERICK:

Q. You never would have thought about him any more if it had not been for this man being found up there?

A. I don't know that I would or not.

Redirect examination by the DISTRICT ATTORNEY:

Q. After this man was found dead you all thought about it again; began to think about it?

A. Yes, sir.

Q. When this man came back in the country you recognized him as being the man?

A. Yes, sir.

Here court adjourned until Thursday a. m., 8:30 o'clock, July 28th, A. D. 1892.

130 THURSDAY MORNING, *July 28th*, 1892, 9:00 o'clock.

JAMES MILLER, having been duly sworn on behalf of the Government, was examined by the district attorney, and testified as follows, to wit:

Q. Where do you live?

A. I live at Vian Station, or near there.

Q. Do you know the defendant, John Graves?

A. Yes, sir.

Q. Where did you first see him?

A. I seen him on Little Vian Creek, near Vian Station.

Q. When was that?

A. Three years ago last February.

Q. What was he doing there?

A. He made rails there awhile.

Q. For whom?

A. George Waters.

Q. Was there anybody with him?

A. Yes, sir; there was a young man with him, helping him make rails.

Q. How many times did you see the defendant?

A. I don't remember exactly the number of times; I seen him three or four different times.

Q. Please state if you saw his wife and children.

A. Yes, sir.

Q. How many children?

A. Two children.

Q. Girls or boys?

A. One was a girl, and the other was a boy.

Q. Which was the oldest?

A. The girl was the oldest.

Q. What was their ages, about, as near as you can guess at it?

A. I suppose the youngest one would be about three years old, and the oldest one about 4 or 5.

Q. Of course, you are just estimating it?

A. Yes, sir.

Q. Where did you see her and the children?

131 A. I seen them at the little house on the Gurdy place, on Little Vian Creek.

Q. What place was it called then?

A. It was called the Miller place at that time.

Q. Now, then, please state if you ever saw this defendant and his wife afterwards, and children; did you ever see them any more, after you saw them there in February these times you speak of.

A. Yes, sir.

Q. When did you next see them?

A. I seen them at George Waters.
Q. When?
A. It was about a week after Christmas, I reckon.
Q. Last Christmas?
A. Yes, sir.
Q. Is this defendant the man?
A. Yes, sir.
Q. Did he have his wife with him?
A. Yes, sir.
Q. And children?
A. Yes, sir.
Q. Had them with him when he came back?
A. Yes, sir.
Q. You say you saw his wife and children when they were there in 1889; please state if it was the same wife and children that you saw with him the last time?
A. Yes, sir; the same wife and children.
Q. Have you seen her since she has been here?
A. Yes, sir.
Q. Is she the same woman?
A. Yes, sir.

Cross-examination:

By Mr. N. L. MARMON. How long have you lived up there?
A. I have been there about 8 years.
Q. Are you a citizen up there?
A. Yes, sir.
Q. Citizen by blood?
A. Yes, sir.
Q. Cherokee?
A. Yes, sir.
Q. Where did you go from when you went there?
132 A. I came from Arkansas.
Q. What part?
A. Conway County.
Q. Were your mother and father Cherokees?
A. My father was.
Q. Where does he live?
A. He is dead?
Q. How long has he been dead?
A. 5 years.
Q. You have established your rights up there in the Cherokee Nation, have you?
A. Yes, sir.
Q. You never saw this man, the defendant, before until you saw him sometime in February, 1889, did you?
A. No, sir.
Q. What kind of a man was that with him?
A. He was a young man.
Q. About how old?
A. Looked to be about 25.
Q. How was he dressed?

A. I don't exactly remember.

Q. Do you not remember what kind of clothes he had on? You certainly remember that.

A. I don't know now.

Q. What kind of clothes did this man have on; you seem to have paid particular attention to him?

A. He had on dark suit of clothes.

Q. Any stripes about the clothes?

A. I don't know.

Q. Did he wear a hat or a cap?

A. He wore a hat.

Q. Boots or shoes?

A. Boots.

Q. What kind of boots?

A. High-top boots, strap buckled around the top of the boot.

The DISTRICT ATTORNEY. That is the defendant?

A. Yes, sir.

Mr. MARMON (of counsel for defense). You do not remember what kind of clothing the other man had on?

A. No, sir; I do not.

Q. What kind of a hat did the defendant wear?

A. Black hat.

Q. How many times did you say you saw him while he was at work there?

A. Three or four times.

133 Q. Where did you see him?

A. I seen him at George Waters's. I seen him pass my house two or three mornings.

Q. Did you ever talk to him?

A. Only once.

Q. When was that?

A. At George Waters'.

Q. How long did you talk with him then?

A. About 15 or 20 minutes.

Q. Who was with you there?

A. A young man that was with me.

Q. Who else?

A. That was all.

Q. Where was Waters and his family?

A. We were not in the house.

Q. Where were you?

A. At the lot.

Q. What were they doing out there?

A. I was weighing him up some hay.

Q. Did you work for Waters?

A. Yes, sir.

Q. You talked with him?

A. Yes, sir.

Q. The other man didn't have much to say; he was a sort of a non-talkative fellow, was he not?

A. I didn't talk with him.

Q. He did not talk with you at all?
A. No, sir.
Q. What were you talking about?
A. We were weighing hay.
Q. You were not talking about that?
A. We were talking about swapping horses.
Q. Who were you talking with about swapping horses?
A. This man.
Q. He claimed the horses that they had there, did he?
A. He did not say they were his exactly.
Q. He was talking about swapping them, wasn't he?
A. Yes, sir.
Q. The other man was present at the time and didn't say anything much?
A. No, sir.
Q. Didn't say that they didn't belong to this man and that he did not have a right to swap them?
A. No, sir.
134 Q. What did he say? Go ahead and tell what he said.
A. I proposed to swap him a span of mules for his mares.
Q. They had two mares?
A. Yes, sir.
Q. Go ahead and tell us about the swap now.
A. He said he didn't care to swap the mares. He said he had some young mares up in the north part of the Territory; that he would swap them if he had them down there.
Q. What part of the Territory did he say they had come from?
A. He didn't say. He said in the northern part, though.
Q. Tell us the rest that he said.
A. That is all, I believe.
Q. Did it take him fifteen or twenty minutes to have that conversation?
A. I don't remember exactly all that might have been said.
Q. Where did he say that he lived?
A. I didn't ask him.
Q. Did he not explain how it was that his mares were up in the northern part of the Territory?
A. No, sir.
Q. Did he say they were at home?
A. No, sir.
Q. Just said in the northern part of the Territory?
A. Yes, sir.
Q. What name did he give you then?
A. He didn't tell me his name.
Q. Did you ask him?
A. No, sir.
Q. Did you ever hear his name? Waters told you his name, I suppose, did he not? When he told you to go out and weigh out some hay, he told you to go out and weigh out Mr. Gaves some hay, did he not?
A. He didn't. He wasn't there.
Q. How did you come to sell 'im Waters' hay?

A. He came up *up* the le and told me that Waters told him to come up and get some hay, and for me to weigh it.

135 Q. How much did you weigh out then?

A. I don't remember.

Q. Was it a ton?

A. No, sir.

Q. Half a ton?

A. No, sir.

Q. Ten pounds?

A. More than 'hat.

Q. Well, about how much?

A. About 75 pounds.

Q. How much did he pay you for it, and who paid you?

A. He didn't pay me for it.

Q. You had never seen him before, and didn't know that Waters had give him permission to come up there and get the hay, and for you to sell it to him on credit. Do you tell me that is the way you do business?

A. I saw him before that time.

Q. Where did you see him?

A. Passing my house.

Q. You had never spoken to him; you didn't know anything more about him than you do about me, did you? Not a thing in the world. You, on the pure word of a stranger, without ever having talked to him, without ever having got any instructions from Mr. Waters, sold him 75 pounds of hay. Who did you charge it to?

A. I didn't charge it.

Q. How were you going to tell Waters when he came back what became of the hay?

A. The man told me that he was getting the hay on his work.

Q. You just took his word for it; is that it?

A. Yes, sir.

Q. You took the word of a stranger you didn't know?

A. Yes, sir.

The DISTRICT ATTORNEY. For 75 pounds of hay for *th* half a dollar.

Mr. MARMON (of counsel for defendant). You didn't know his name?

A. No, sir.

Q. You didn't know whether he was telling you the truth or not?

A. No, sir.

136 Q. You just let him have the hay, and you never thought to inquire his name?

A. I didn't.

Q. Did you tell Waters about it afterwards?

A. Yes, sir.

Q. Who did you tell him got it?

A. I told him that man who was at work for him.

Q. There was two at work for him; according to your testimony there was two men at work for him making rails; which one did you tell him got the hay?

A. I didn't tell him which one.

Q. Did they have the hack up there?

A. Yes, sir.
Q. Which one drove it?
A. This man, I believe.
Q. What kind of a looking hack was that?
A. It was a two-horse hack with springs under it.
Q. What else did it have about it? What kind of a cover did it have to it?
A. It didn't have no cover at all.
Q. What was the color of these mares?
A. Dark bays.
Q. What size were they? How tall?
A. About 15 hands high.
Q. They matched pretty well, did they not?
A. Yes, sir.
Q. Both about 15 hands high?
A. Yes, sir.
Q. Have any blaze in their foreheads, anything of that kind, any spots about them, that you remember of; or any brands on them?
A. One of them had some white in the forehead, I believe.
Q. Any brands?
A. I never noticed any: I don't know.
Q. You were talking about trading for them; you noticed them particularly, didn't you?
A. I didn't notice them particularly.
Q. How is it you offered to trade a span of mules for the mares if you didn't notice them particularly? There must have been something that attracted you?
A. They were good size; looked like good animals.
137 Q. Of course you looked around them to see if there were any defects on them before you would talk about trading for them, wouldn't you?
A. No, sir.
Q. You just bantered him off hand to swap with him a span of mules for a span of mares?
A. Yes, sir.
Q. Did you own a span of mules?
A. Yes, sir.
Q. Did you have them there?
A. Yes, sir.
Q. Did you show this man your mules?
A. No, sir.
Q. He just told you that he did not want to trade?
A. Yes, sir.
Q. You can not give me about the size of this young man, 25 or 30 years of age; you know about his age, but you can not give me his size, can you?
A. No, sir.
Q. Was he as tall as you are?
A. Yes, sir; he was taller than I am.
Q. Was he any heavier?
A. Yes, sir.

Q. How much?
A. About 25 pounds.
Q. How much do you weigh?
A. 126.
Q. That would make him about 150 pounds?
A. Yes, sir.
Q. What complexion was he?
A. Rather red-faced—red-complected fellow.
Q. What was the color of his hair and eyes?
A. Kind of light hair.
Q. What was the color of his eyes?
A. Blue eyes.
Q. What was he wearing on his head?
A. I don't know, sir.
Q. Do you know whether it was a hat or cap; you remember what the other man was wearing; can you tell me what the red-complected man was wearing?
A. I don't remember.
Q. Where did you see the women and the children?
138 A. I seen them at a little house where they were stopping, where they were at work.
Q. How near were you to them?
A. I walked up in about 10 steps of the door.
Q. Where was she at the time?
A. Standing in the door.
Q. You spoke to her, I suppose?
A. Yes, sir.
Q. What did you say to her?
A. I said "Good morning."
Q. What time in the morning was that?
A. It was about 9:00 o'clock.
Q. What did she say?
A. She said "Good morning."
Q. What did the little children say?
A. They didn't say anything.
Q. They were standing by her, I suppose?
A. Yes, sir.
Q. All in the door?
A. Yes, sir.
Q. Is that all that was said?
A. I asked her which way the gentleman of the house was.
Q. What did you ask her that for?
A. I wanted to know where he was; I wanted to see him.
Q. What did you want to see him for?
A. I wanted him to go down with me on the creek.
Q. What for?
A. I had wounded a deer down there and I wanted some one to help me to catch it.
Q. Was that after you had seen him up at Waters's crib?
A. Yes, sir.
Q. Where did she tell you they were?

A. She said he had gone to work.

Q. How is it you went to a stranger? How is it you did not go to some of your near neighbors and friends that had dogs to catch the deer?

A. That was the nearest house where any one was living.

139 Q. Did you go and get any one else to help you catch the deer?

A. I went on, but I got nobody.

Q. Did you go to see anybody else?

A. Yes, sir.

Q. Who?

A. A man that was living on my place.

Q. What was his name?

A. Ryans.

Q. Did you find Ryans?

A. Yes, sir.

Q. What did he say?

A. He said he had to go to work.

Q. He didn't have confidence enough in your story to go back with you.

The DISTRICT ATTORNEY. Never mind that.

Mr. MARMON (of counsel for defense). He did not go with you, at any rate?

A. Yes, sir; he didn't go.

Q. Did you go back to see about the deer?

A. Yes, sir.

Q. Didn't find it?

A. No, sir.

Q. How far was that from where these people lived then?

A. About half a mile.

Q. You never saw her afterwards?

A. No, sir.

Q. You never saw the children afterwards?

A. No, sir; not until last winter.

Q. You were thinking mostly about that deer then, were you not?

A. Yes, sir.

Q. You can not tell me that you know that this woman here is the same woman you saw there after three years, with nothing to call your attention especially, and being hunting somebody to assist you in capturing a wounded deer—you can not tell me that, can you, without having any other conversation, only the one time. I suppose you did not stay long after she told you that the men were away at work?

A. No, sir.

140 Q. Will you swear now that she is the same woman?

A. Yes, sir.

Q. What particular marks about her that you know her? What is there peculiar in her appearance from other women of the same clothes and complexion that you recognize?

A. Well, I know her.

Q. You just know her anyhow. What is it that made such an impression on you there?

A. I know her by her general appearance.

Q. What kind of a dress did she have on?

A. I don't remember.

Q. What kind of a bonnet did she have on?
A. She had on none.
Q. What was the color of her hair?
A. Light hair.
Q. Do you swear positively that the color of the hair of the woman you saw there was light?
A. Well, yes; light hair.
Q. Was it as light as yours?
A. No, sir.
Q. Do you call my hair light?
A. No, sir.
Q. Point out somebody in the room, if you see anybody here, with about the same color of hair as hers. (Witness looks around room.) How does it compare with the color of the hair of that juryman sitting in the corner?
A. It was something near that color.
Q. You say there were two children there?
A. Yes, sir.
Q. How were they standing in the door, one on each side of her, I suppose?
A. No, sir.
Q. Both on one side?
A. Yes, sir.
Q. Which side were they on, her right or left?
A. They were on the right side.
Q. You are swearing to that?
A. Yes, sir.
Q. Both of them on the right side?
A. Yes, sir.
Q. Which was nearer to her, the younger one or the older one?
A. The oldest one.
141 Q. Have her by the hand?
A. No, sir.
Q. By the dress?
A. No, sir.
Q. Did the little one have hold of the larger child or not?
A. I don't know, sir.
Q. Which was the boy and which was the girl, or were they both boys or both girls?
A. The largest one was a girl.
Q. She had on a dress?
A. Yes, sir.
Q. She was four or five years old?
A. Yes, sir.
Q. How old was the other one?
A. About 2 or 3 years old.
Q. What was it, a boy or a girl?
A. It was a boy.
Q. Had on pants, I suppose?
A. Yes, sir.

Q. You remember that distinctly, that the younger one had on pants?
A. Yes, sir.
Q. You didn't learn the names of the little girl and boy?
A. No, sir.
Q. How do you know that was a boy, because it had on pants?
A. I just supposed it to be.
Q. You have talked with Waters a great deal about this matter, have you not?
A. No, sir.
Q. Have you talked to anybody about it?
A. No, sir.
Q. Who ever found out that you knew anything about this case; you were not before the commissioner. Who was the first person that ever spoke to you about it?
A. I don't know.
Q. You never talked to anybody; you never told anybody about this after this man was missing; you never told any person up there about what you knew in regard to the case until you came down here, did you? You never talked to anybody about it, any deputy marshal or any other person?

142 A. No, sir; I never talked to no marshal about it.
Q. Well, to anybody, any person in the world, whether it was a deputy marshal or not?
A. I told Mr. Palmer I had seen the woman.
Q. When did you tell him?
A. Along last spring—no, it was in the winter.
Q. What time in the winter was it?
A. Some time after Christmas.
Q. Now, was it the first of January or the first of February o' the last of December?
A. I don't remember.
Q. Give me an idea about when it was. Was it in last year or this year?
A. It was in this year.
Q. Was it as late as the 10th of January?
A. Yes, sir; I guess it was.
Q. Well, now about what time? Was it the early part of January or the latter part of it?
A. It was along about the first of January.
Q. How did you happen to tell Mr. Palmer about it?
A. He asked me if I seen the woman when they were.
Q. Don't you know that this man was not arrested until in February?
A. Yes, sir.
The DISTRICT ATTORNEY. He was there Christmas, however.

Redirect examination:

By the DISTRICT ATTORNEY: How much is 75 pounds of hay worth?
A. Seventy-five 'cents.
Q. A cent a pound?
A. Yes, sir.

143 GEORGE WATERS, having been recalled upon behalf of the Government, was examined by the district attorney, and testified as follows, to-wit:

Question. I believe you stated you were before the grand jury when the indictment was found?

A. Yes, sir.

Q. I want you to state the names of all the witnesses who were before the grand jury in this case?

A. I was there, and my wife, Mary Waters, and James Barnes, C. S. Palmer—no, Palmer wasn't there—Robert Williams, James Smith, D. M. Barrick, and J. E. McDaniel, Aaron Herron.

Q. Aaron Heron is not here?

A. No, sir.

Q. Was John Waters before the grand jury?

A. No, sir.

Q. J. S. Downing?

A. No, sir.

Q. Mrs. Palmer?

A. No, sir.

Q. William Palmer?

A. No, sir.

Q. James Miller?

A. No, sir.

Q. There were seven of them before the grand jury?

A. Yes, sir.

Q. This dead body that was found was found in the Cherokee Nation, Indian country?

A. Yes, sir.

144 Government rests.

145 The defendant, to maintain the issues on his part, introduced and examined the following witnesses: Charles L. Tapp, Mrs. Malinda S. Tapp, Dr. L. E. Page, T. H. Woolum, Ed. Sweet, George Nummey (book referred to in testimony of Ed. Sweet introduced in evidence), Mrs. Mary E. Nummey, Samuel Fellner, who testified as follows:

146 *Defense testimony.*

CHARLES L. TAPP, having been duly sworn upon behalf of the defense, was examined by Mr. C. J. Frederick, and testified as follows, to-wit:

Question. Where do you live?

Answer. Winslow.

Q. How long have you lived at Winslow?

A. I have lived there about 6 years.

Q. What is your business there?

A. I am clerking in a store there.

Q. Has that been your business since you have been there?

A. I run a store there myself when I first went there.

Q. How long did you run the store?

A. Four years.

Q. It has been about 2 years ago you quit running the store?
A. Yes, sir; about a year and a half ago.
Q. Do you know this defendant, John Graves?
A. Yes, sir.
Q. How long have you known him?
A. The first time I met him I think was about the middle of January, 1889, to the best of my recollection.
Q. Where did you meet him at?
A. At Winslow.
Q. Winslow is where?
A. It is in Washington County, Arkansas.
Q. On a railroad?
A. Yes, sir; on the Frisco Railroad.
Q. You first met him about the middle of January?
A. Yes, sir; 1889.
Q. What was he doing there?
A. He got off the train there and came over to my store and inquired for his wife's relatives there.
Q. What names did he give?
A. He asked for Mr. Morgan and Mr. Connelly.
147 Q. Was he alone?
A. No, sir; his wife and children were with him.
Q. Did you see him after that?
A. Yes, sir; I seen him frequently after that, for I reckon it was six weeks or probably two months he was around there.
Q. Do you know what he was doing?
A. Well, I don't know exactly that I know what he was doing all the time; he was over at Mr. Connelly's the most of time he was there, his brother-in-law's, and my understanding was he was helping Mr. Connelly make ties occasionally. I know that he came in the wagon with Mr. Connelley.
Q. What would he come there for?
A. He would come in there and bring in ties generally, and buy their supplies.
Q. From whom did they buy supplies?
A. From me.
Q. Who did the trading with you?
A. Mr. Connelley did the trading when he come himself, and a few different times Mr. Graves came in when Mr. Connelley didn't, and Mr. Connelley sent in by him for goods.
Q. Do you know when it was that he bought the first goods at your store when Graves was there?
A. Yes, sir. (Witness produces a book.) It was the 24th of January, 1889.
Q. What did he buy?
A. He bought some wine.
Q. When did he buy the next?
A. 9th of February, 1889.
Q. Give us the dates of the purchases that he made; when was the next?

A. Then on the 11th of February, and then on the 16th, and on the 20th.

Q. Do you know what they did with the ties they brought there? Did they sell them or what?

A. I bought them myself.

Q. Is this man, the defendant, the man you did the trading with?

A. Yes, sir.

148 Q. How long after he came there and left the baggage was it when he first got off the train until he bought the wine?

A. It must have been a week or ten days, probably.

Q. That was on the 24th that he bought the wine?

A. Yes, sir.

Q. The next purchase was on the 9th?

A. On the 9th of February following; yes, sir.

Q. 9th, 11th, 16th, and 20th of February?

A. Yes, sir.

Q. Did you have any conversation with him when he first came there and got off the train?

A. He was making inquiries about his people, Mr. Morgan and Mr. Connelley, and some one, I reckon, cited him to me; I don't know, but anyway he came and asked me about them and I told him where they lived.

Q. You knew them?

A. Yes, sir; they were both trading with me at that time. Mr. Connelley lived a mile and a half or two miles and Mr. Morgan lived about three or four miles or may be a little further than that.

Q. How long did they leave the baggage there?

A. I don't remember just how long. He went out with Mr. Connelley and then sometime not very long after that Mr. Connelley came in with a team and carried the baggage out there.

Q. Did his wife and children go with him when he left?

A. Yes, sir.

Q. Did you ever see them back any more?

A. Yes, sir; they were there frequently.

Q. There at the store?

A. Yes, sir.

Q. Have you seen his wife since you have been in town?

A. Yes, sir.

Q. Is she the same woman.

A. Yes, sir.

149 Q. That was in Washington County, this State, Arkansas?

A. Yes, sir.

Q. You first saw them, you think, about the middle of January 18, 1889?

A. Yes, sir.

Q. The first purchases were made in January and February, 1889?

A. Yes, sir.

Q. Do you know where he went when he left there, or do you know when he did leave there?

A. I know when he left, but then I do not know the exact time, the exact dates that he left.

Q. How long did you say that you thought that he staid there?

A. I think he must have been there some six weeks or two months, there or thereabouts.

Q. He is no relation to you, is he?

A. No, sir; no akin.

Cross-examination by the DISTRICT ATTORNEY:

Q. How many children did he have?

A. Two.

Q. What were they boys or girls?

A. Well, I could not say what the least one was; the oldest one was a girl.

Q. Was the least a boy?

A. I could not say.

Q. How old was the least at that time?

A. It was small.

Q. A couple of years old?

A. If it was it was small for its age.

Q. How old was the oldest one?

A. She looked like she was three or four years old, probably; may be a little older; I don't know.

Q. You do not know what the youngest one was?

A. No, sir; I could not say.

Q. Then he had a wife and two children?

A. Yes, sir.

150 Q. When he left who did he leave with? Who took him away?

A. He left with his wife and two children.

Q. Who took him away?

A. The train.

Q. Did he go on the train when he left?

A. I think he did.

Q. Do you know?

A. I don't know positively; I didn't see him get on it.

Q. Don't tell me anything you do not know. Where did he live—on which side of the tunnel?

A. On the north side.

Q. How far from the tunnel?

A. Do you mean where Mr. Connelly lived?

Q. The defendant?

A. He staid the most of the time with Mr. Connelley, was living about a mile and a half or two miles.

Q. Where did Morgan, his father-in-law, live?

A. He lived still on, rather northwest of Mr. Connelley, a mile and a half or two miles further.

Q. Down White River?

A. No, sir. It was out rather in the direction of Lees Creek.

Q. North or south of the tunnel?

A. It was northwest of the tunnel, or a little bit west of north.

Q. At a point on the railroad opposite where Morgan lived would be south of the tunnel?

A. Yes, sir.

Q. How far from the tunnel did Morgan live?

A. He lived some three or four miles, pro'ably a little further.

Q. Then he must have lived further than 2 miles from you, if you lived at Winslow?

A. He did. I say that Mr. Connelley lived a mile and a half, or a little further, and Mr. Morgan lived still further on—a mile and a half or two miles.

Q. Do you remember the big snow we had that year, about the only snow we had?

A. Yes, sir; I believe I do.

151 Q. Try and fix that in your mind now; was it before or after, or during that snow that this trading was going on at your store?

A. I am not sure.

Q. Think about it awhile before you answer, and tell me which it was?

A. I could not say positively whether it was during the snow or not.

Q. If it wasn't during the snow was it before or after?

A. I could not say.

Q. What is your best impression?

A. My best impression is part of the trading was done during the snow, but I may be mistaken.

Q. Turn to these items and let me see your book. (Witness does as is requested.) Have you got Connelley's account here?

A. No, sir; that there, I just taken that from the original book.

Q. When was this made; when did you take this off?

A. I took it off when I started down here.

Q. This is not the regular entry?

A. No, sir.

Q. Where is the book that contains the regular entry, the original entry?

A. Up at home, at Winslow.

Q. You are not in business now?

A. No, sir; not for myself.

Q. That book is an old book?

A. Yes, sir.

Q. Closed?

A. No, sir; it is not.

Q. Why?

A. Because there is some accounts not collected on it.

Q. You could have brought the book here?

A. Yes, sir; I could have done it.

Q. Why not bring it?

A. It was simply because that was a little handier to bring than that. I supposed this would do just as well.

152 Q. It would not be much work to bring a ledger here?

No, sir; I know it would not be very much.

Q. Why not bring the original entry. Were you asked to bring the original book?

A. No, sir; I wasn't.

Q. Did the gentlemen on the other side of this case know that you had entries that would show these dates?

A. I don't know that he did.

Q. They have set out an application here what you would testify to; now, why not bring that original book?

A. I supposed this would do just as well, as I kept the other book, and I drawed this off.

Q. You thought it would do just as well?

A. Yes, sir.

Q. You have been in court before as a witness?

A. I believe I was in court, in this court, once before.

Q. Were you never in court with your account books?

A. No, sir; I never was.

Q. I would like to know what Connelley's account is; whether Connelley bought anything on those days?

A. No; on them dates he did not.

Q. If Connelley would give Graves an order, and Graves would turn that over to somebody else, and that somebody else would present it to you, would your books show it?

A. Yes, sir.

Q. What would it show?

A. It would show who it was took it up. It would show on the books who it was taken up by.

Q. Does your books show anything about that, as to whether it was produced by Graves or produced by anybody else; whether it was taken up by Graves or who?

Yes, sir; it shows it was taken up by John Graves.

Q. Suppose that his wife was to bring an order there given by
153 Connelley to Graves?

A. I would charge it by Mrs. Graves.

Q. Notwithstanding the order would be to pay John Graves ten dollars, or to pay John Graves three dollars, or to let John Graves have some wine, you would charge it on account of his wife, would you?

A. Of course I would——

Q. You would take up the order with Connelley's name on it, directing you to allow John Graves to have so much wine, and you would charge it to his wife, would you?

A. I would charge it to him by his wife.

Q. To John Graves by his wife?

A. Yes, sir.

Q. Did Connelley sign this order?

A. He didn't give any written order at all.

Q. Why do you say Connelley by John Graves' account?

A. Simply because Mr. Connedley told me if Mr. Graves was in there and he sent for anything to let him have it.

Q. Did he tell you to let his wife have it?

A. No, sir.

Q. Then it would be John Graves, no matter who got it, if you only had instructions from Mr. Connelley to charge it by John Graves' account; it would be Connelley by John Graves, no matter who got it, if you were to charge it on the Graves' account?

A. Yes, sir.

Q. So you could not tell whether Graves got it himself or some of his family, could you?

A. No, sir; not without I would specify who got it.

Q. Your original book is at home?

A. Yes, sir.
Q. You live on the railroad?
A. Yes, sir.
Q. Right at Winslow Station?
A. Yes, sir.
Q. How many miles from here?
A. 41 miles, I believe.
154 Q. Your book is there that shows the whole account?
A. Yes, sir.
Q. And yet it is not produced because it is not inconvenient?
A. It was a little more inconvenient to carry than this would be, for I can stick this in my pocket and I could not stick that in.
Q. How long has it been since you have not been running your store?
A. About a year and a half.
Q. When did this defendant leave?
A. It must have been sometime in March or maybe the first of April when he left there.
Q. Where did he go?
A. I could not say.
Q. Where did he start to go?
A. I don't know, sir.
Q. Did he ever come back any more?
A. Yes, sir.
Q. When?
A. To the best of my recollection, it was sometime in August; I am not sure.
Q. Of the same year?
A. Yes, sir.
Q. Did you see, along in 1889, February or January or March, a man passing through there with two horses and a hack?
A. Well, I don't know; I probably did.
Q. Driving a hack with two dark bay mares, travelling through that country for Oklohoma?
A. I could not say, for they passed through there very often.
Q. Have you any recollection of that?
A. No, sir.
Q. A man about 25 or 30 years old, light complected, rather large man?
A. I might have seen such a man, but I have no recollection of it right now. I saw people passing through there frequently.
Q. How do you go by land across the mountain from your place to this side of the tunnel?
A. There is two roads leading out.
155 Q. Do either one of these roads go by Connelley's place?
A. No, sir.
Q. Do either one of them go by Morgan's place?
A. No, sir.
Q. How near to it?
A. There is one road that goes about half a mile nearer Mr. Connelley's, and Mr. Morgan's also, than Winslow is.
Q. How near is that?
A. It is a mile and a half or a mile from Connelley's.

Q. It is a mile or a mile and a half from Connelley's to Winslow?
A. Yes, sir.
Q. Did he take his wife away with him when he left?
A. Yes, sir.
Q. Did he bring her back with him when he came back?
A. Yes, sir.
Q. How often have you seen this defendant while he was there?
A. I could not say, because when he was there he was there around the station frequently.
Q. You know him?
A. Yes, sir.
Q. How do you know this is the same man?
A. When you have as much acquaintance with a man as I did with him I won't forget him that quick.
Q. You have seen other men with black hair and eyes?
A. Yes, sir.
Q. You have seen other men that looked like him, haven't you?
A. Yes, sir; some resemble him some.
Q. You know him, of course, then, from his general appearance, by having seen the man before?
A. Yes, sir.
Q. That is the way you know the man, is it not?
A. Yes, sir.
Q. How often did you see the woman?
A. I saw her tolerable often, probably once or twice a week, anyway.
Q. You know her?
A. Yes, sir.
Q. She is here?
A. Yes, sir.
156 Q. Describe her.
A. Well, she is a low, heavy-set lady; her hair is not as dark as my hair.
Q. About like that juror setting there?
A. Yes, sir; a little bit darker than his.
Q. Between yours and his?
A. Yes, sir.
Q. A heavy suit of hair?
A. Yes, sir.
Q. She is the kind of a woman you would know after seeing her once?
A. Yes, sir.
Q. She is peculiar, is she not?
A. Yes, sir; some little.
Q. She is the kind of a woman you would recognize after seeing her once?
A. Yes, sir.
Q. What does your ledger show; what is the exact language of the ledger from which you claim to have taken these accounts?
A. I just charged it to Connelley, goods by John Graves.
Q. Did you take it out of the whole list of charges against Connelley? Was this all in together in the ledger, or was it scattered along through the ledger?

A. It was put all on one page, may be on two pages of the ledger, I am not sure. I had no regular ledger.

Q. Did you have a blotter?

A. Yes, sir.

Q. Did you examine that?

A. No, sir, I didn't. Because the blotters have been laid and scattered around.

Q. Did you keep your own books or did you have a clerk?

A. I kept my own books.

Q. Sometimes you would let your blotters run on a week or two before you would post up your ledger?

A. No, sir; I would generally do it every night.

Q. Would you every night?

A. I never let it run over more than two days.

157 Q. The blotter would be the original entry, the first entry?

A. Yes, sir.

Q. That would show the exact date.

A. Yes, sir.

Q. Then you transferred that to the ledger?

A. Yes, sir.

Q. That ledger you have?

A. Yes, sir.

Q. Do you recollect outside of that what time it was you saw this man, independent of the ledger.

A. No; I could not give the dates at all.

Q. Do you remember, independent of your books, the month it was in?

A. I could not say that I did. I know it was in the winter time, though.

Q. He came there to your house in the winter of 1889, and staid about 6 weeks and left?

A. Yes, sir; probably 2 months.

Q. And during that time did he buy anything else from you except what you have on your ledger; have you got all your transactions with him on your ledger?

A. I think I have. That on the 16th day of February, I didn't let them have that myself; I was there, though, but I didn't let them have it; my wife let him have that.

Q. How far did you say that Connelley lived from the railroad?

A. It is a mile and a half or two miles, I guess.

Q. Did you see him when he left, Connelley and his family?

A. No, sir.

Q. Did you see them when they returned?

A. Connelley?

Q. I mean the defendant, when he left there?

A. No, sir.

Q. Did you see them when they returned in August?

A. Yes, sir; I think I did.

Q. How long did they stay there then?

158 A. I could not say just how long they staid. I seen them pass back and forth on the train, once or twice from Chester——

Q. Where did he live when he returned in August?

A. He went over to Mr. Connelley's.

Q. How long did he remain there that year, 1889?

A. I don't remember just how long he was there; he was over at Mr. Connelley's probably a week, or two or three weeks, back and forth there.

Q. Where did he go then?

A. My understanding is that he was going to his father-in-law's.

Q. I want to know how long he remained in that country before he left again?

A. I seen him there off and on for two or three months, I think.

Q. Then what became of him?

A. I think it was the next summer sometime that I seen him down here on the Frisco road.

Q. Doing what?

A. I don't know what he was doing; I just stopped off there and saw him there at the station, the first station this side of Wister, Choctaw Nation; I forget the name of the station.

Q. During the time he was up in your section of the country did he own any property?

A. No, sir.

Q. Do you know of his owning any?

A. No, sir; I don't know that he did or did not; I didn't see any there.

Q. Either from his own statement or having seen any property?

A. No, sir.

Q. Do you know of his owning an ox team?

A. No, sir.

Q. Or horses, or anything like that?

A. No, sir; I don't know of his owning any property there at all.

Q. You never saw him with any, you say?

A. No, sir.

159 Redirect examination by Mr. C. J. FREDERICK:

Q. In reference to that least child, how old did you say it was when they came there, or do you know?

A. I could not say.

Q. I will ask you whether or not they carried it in their arms?

A. Yes, sir.

Q. Was it at its mother's breast nursing?

A. I don't remember about that. I know it was a small child.

Q. You know they carried it?

A. Yes, sir.

A JUROR. I want to ask the witness a question. I want to ask him if these entries are taken from his ledger or blotter?

A. Yes, sir; they are from my ledger.

Q. Then I want to ask, in making up the ledger it reads debtor to merchandise, or debtor to these articles?

A. It reads debtor to the articles that are on this book.

Q. You named the articles on your ledger?

A. Yes, sir.

Mr. FREDERICK. Just the same as you do on your blotter?

A. Yes, sir; I have no regular ledger at all.

The DISTRICT ATTORNEY. You transferred them from the blotter to this?

A. Yes, sir.

Mr. FREDERICK. You simply put down the articles on the blotter or the daybook, or whatever you call it, and then you transcribed that on this ledger, as you call it?

A. Yes, sir.

Q. Did you keep it?

A. Yes, sir; I did all the writing myself.

Q. These dates and items are correct?

A. Yes, sir; they are.

160 Mrs. MALINDA S. TAPP, having been duly sworn upon behalf of the defense, was examened by Mr. C. J. Frederick, and testified as follows, to wit:

Question. You are the wife of the gentleman who just left the stand?

A. Yes, sir.

Q. You live at Winslow?

A. Yes, sir.

Q. In Washington County?

A. Yes, sir.

Q. How long have you lived there?

A. I have lived there about 11 years, I reckon, or thereabouts.

Q. You have lived there longer than your husband?

A. Yes, sir.

Q. I will ask you if you know this defendant?

A. Yes, sir.

Q. Who is he?

A. John Graves.

Q. Where did you ever see him before?

A. At Winslow; the first time I ever did see him.

Q. When did you first see him there?

A. I could not hardly tell the first time I saw him there; I could not tell the dates at all.

Q. What month or year?

A. It seems to me like it was in the fall.

Q. Of what year? How long ago?

A. It was in 1889, I believe.

Q. How did he come there? did he come alone or with anybody?

A. No, sir; he came with his family, I think, when he first came.

Q. How did he come?

A. I suppose that he came on *on* the train; he left his baggage there in our place; we were running a store there.

Q. Did he come in the store himself?

A. Yes, sir.

161 Q. And his wife and children?

A. Yes, sir.

Q. How many children were there?

A. Two.

Q. What size children were they?

A. They were small children; the little girl was the oldest; the little boy looked liked he might be two or three years old; he was running around there.

Q. About how old was the girl?

A. I don't know what age she was; she was tolerable large for her age.

The DISTRICT ATTORNEY. Five or six years old?

A. Yes, sir; she looked liked she might be.

Mr. FREDERICK. The little boy two or three years old?

A. Yes, sir.

Q. Was he at the breast?

A. I don't know; I never see him but once.

Q. Did they carry him?

A. I don't know whether they carried him.

Q. How long did they stay there?

A. They staid there until the spring of the year.

Q. How often did you see Graves, this man, after he came there?

A. Well, I could not hardly tell you how often I seen him; I seen him several times.

Q. Did you see him often or just occasionally?

A. I seen him tolerable often.

Q. Did he have any business transactions with you all?

A. Yes, sir; he done his trading there, what he did do.

Q. Do you know when it was that he bought goods there?

A. I know that he bought goods from me.

Q. When did he buy goods from you?

A. 16th day of February, 1889.

Q. He bought these from you?

A. Yes, sir.

Q. What was it he bought?

A. Kraut and salt.

162 Q. Was he buying on his own credit? Did he have a credit there?

A. He was trading on Mr. Connelley's credit.

Q. Do you know what business he was following while he was there?

A. Occasionally they brought in ties and we bought them; they said they made them.

Q. Who had them brought in?

A. Mr. Connelley, and he came in with them.

Q. What did they do with the ties?

A. They sold them to us.

Q. To you and your husband?

A. Yes, sir.

Q. Was the account that he made at your store paid?

A. Yes, sir; part of it was.

Q. How was it paid?

A. In the ties.

Q. The kraut and salt that he bought was charged on that book, on the 16th of February, that he bought of you?

A. Yes, sir.

Q. Is this defendant the same man?

A. Yes, sir.
Q. Have you seen his wife since you have been here?
A. Yes, sir.
Q. Is she the same woman?
A. Yes, sir.

Cross-examination by the DISTRICT ATTORNEY:

Q. How often have you seen his wife?
A. Lots of times.
Q. Before she left?
A. Yes, sir; she would come there often.
Q. Where did she live?
A. She lived out at Mr. Connelley's while she was there.
Q. I suppose the only recollection you have about its being the 16th is what your book shows?
A. Yes, sir.

Q. You say that part of his account was paid; how much of it?
163 A. His account was all paid; M. Connelley owes us a little yet.
Q. Connelley paid the account?
A. He has not yet.
Q. Connelley paid for what he got, did he?
A. Yes, sir.
Q. When did he make his payment?
A. Along when he would bring in tries.
Q. Does your book show that he paid this account off?
A. Yes, sir; I think so.
Q. When was it?
A. I could not tell you?
Q. Do you remember the snowstorm of that year—one time when we had a big snowstorm, perhaps a foot deep—up at your place in 1889, only snow we had that year? Do you remember it?
A. Yes, sir; I think so.
Q. Was this snow before or after you traded with him?
A. I don't know; I don't remember; I know it was very cold.
Q. Was the snow on the ground or had it melted off, or come afterwards?
A. It was several days that it was very cold.
Q. It does not always snow when it is cold; do you remember whether there was snow or not?
A. I don't think I can remember.
Q. You had a snowstorm that year—very late in the year—do you not remember?
A. I remember when it was, but I do not remember the date it was.
Q. Do you remember whether this transaction of selling the goods was before or after that snow?
A. No, sir; I don't.
Q. Do you know whether he left home before or after the snow?
A. No, sir.
Q. You do remember the snowstorm, do you?
A. Yes, sir.

Q. You remember that came quite late in the year, do you not? Spring opens up in February, does it not?

164 A. It hardly opens up *up* in that country in February.

Q. Did you see them when they left there?

A. No, sir.

Q. Do you remember about that time of a young gentleman about 25 or 28 years of age coming through there *that* a hack and two horses?

A. No, sir; I don't recollect that.

Q. You know nothing about that?

A. No, sir.

Q. You folks are not any relation to Mr. Morgan or Mr. Connelley, are you?

A. No, sir; none in the world.

Q. You think that he came in the fall; how early in the fall do you think that he came there?

A. I could not hardly tell you; I was sick at the time that he came; wasn't very well; I was there though, and it was in the fall; I remember that.

Q. About what month would you say; was it in October or September *of* November?

A. It seems like it was along the last of August or first of September; I would not say positively, because I do not know.

Q. If he came there in the last of August or the first of September, and only staid two months, and you sold him these goods in February, he must have gone off and came back?

A. I do not say it was that time.

Q. But you think it was?

A. Because I don't remember.

Q. If he came in February—in August, I mean—and staid until February, that would be 6 months; he must have staid six months before he got off?

A. I don't remember how long he staid.

Q. But your recollection is that he came there early in the fall, last of August or first of September; do you remember when they came there whether wheat had just been recently cut?

A. No, sir.

Q. You do not remember about that?

A. No, sir.

165 Q. How about apples; were apples in their season at that time?

A. I don't remember about that.

Q. Is there any way you can get at it so as to fix the time that they came there?

A. No, sir; I can not remember, only just by the book, and I can swear by that because we keep correct dates on our book that we can swear to in any case.

Q. So that if you had to sue anyone you could swear to them in court?

A. Yes, sir.

Q. You have not brought that book here?

A. No, sir.

Q. Have you looked over the book?

A. Yes, sir; he looked over the book.

Q. Does it show anything else besides that 16th?

A. Yes, sir; it shows several dates, but I don't remember them.

Q. If he was there so long, for six months, how is it that your books only shows those running from the 24th of January to the 20th of February? The book only shows just enough time to cover the time that it is claimed that he did this murder?

A. I can not tell you anything about that.

Q. That is true, nevertheless.

Redirect examination by Mr. C. J. FREDERICK:

Q. Did you buy any goods for cash?

A. Yes, sir.

Q. When goods are bought for cash you never charge them?

A. No, sir.

Q. Never keep any account of them at all?

A. No, sir.

166 Dr. L. E. PAGE, having been duly sworn upon behalf of the defense, was examined by Mr. C. J. Frederick, and testified as follows, to wit:

Q. What is your name?

A. L. E. Page.

Q. What is your business?

A. I am practicing medicine at Winslow, Washington County, Arkansas.

Q. How long have you lived up there?

A. I have lived there ever since 1884.

Q. Do you know this defendant, John Graves?

A. Yes, sir.

Q. Where did you ever see him before?

A. I saw him at Winslow, in 1889.

Q. About what time in 1889?

A. Some time in the early part of 1889, I think, in February or March, the first time I saw him; I think it was in February, as near as I can approximate the dates.

Q. Did you have any dealings with him?

A. Yes, sir.

Q. State what they were, please.

A. He called on me to prescribe fo' his wife and little boy; he said they were sick.

Q. Did you do it?

A. Yes, sir.

Q. What did you do?

A. I went and gave them medicine; I went to Winslow; they were at Mr. Tappe's store.

Q. Whom did you see?

A. His wife and little boy.

Q. You prescribed for them?

A. Yes, sir.

Q. Did you charge it?

A. No, sir; he paid me for it.

Q. Did you see him after that?

A. Yes, sir.

Q. Often?

A. Yes, sir; I saw him frequently after that; I do not know how often, though.

167 Q. What was he doing about there; did you notice?

A. He was staying with his brother-in-law out west of Winslow, Mr. Connelley. I don't know what he was doing there. They were at work at something, but I do not know what. I think they were in some timber, possibly, or something of the kind.

Q. Do you remember any other time that you saw him? Do you remember distinctly any other time that you saw him except this time you prescribed for his wife?

A. Yes, sir; I saw him once when he was going to Chester one day.

Q. What was he going to Chester for?

A. I don't remember what he was going for; I think just on a visit, probably; he had some relatives down there. I sent with him—gave him an order to the drugstore for some medicine, and he sent it to me by the express messenger.

Q. Do you remember when that was?

A. I don't remember; it was a short time after I seen him there; a short time after that.

Q. Did you see the man at any other time that you remember of?

A. Nothing particular. I don't remember any other time.

Q. For the purpose of refreshing your memory, didn't you treat some other patient——

A. Oh, yes; there was a young man from this town of Fort Smith was up there at Mr. Woolums.

Q. Who is that?

A. He lived at Winslow—was keeping a hotel at that time there. I had charge of his case. I was treating him.

Q. What was his name?

A. Hawthorn. It required a great deal of my attention to attend to him. He didn't want me to leave him hardly at all, and I was called out one day to see a patient in the neighborhood of where Mr. Graves was stopping, near where his brother-in-law lived, on the 13th day of March that was, as well as I remember, and I came by there where Mr. Graves

168 was staying to see if I could see any of them or hear anything about how they were getting along, but I didn't see any of them that day. I don't think there was anybody at home at all, not even his brother-in-law. I didn't see anybody about the place when I came by.

Q. Did you see Graves about that time?

A. It hadn't been a great while before that that I had seen him there; I don't know how long; I can't remember. It was about that time. I saw him about that time about Winslow there.

Q. You mean to say you saw Graves while you were attending Hawthorne?

A. Yes, sir; he called on me after I commenced treating him.

Q. When did you next see him?

A. Sometime in February.

Q. How long did you treat him?

A. Until the 17th of March; they brought him home to Fort Smith on the 17th day of March.

Q. It was during that time you saw him?

A. Yes, sir.

Q. How often during that time did you see Graves?

A. I do not know; I saw him frequently. He was there every few days at Winslow and I met him there a great many times.

Q. What time in February did you commence treating Hawthorne?

A. I think about the 12th or 15th, somewhere along there about the middle of the month, I think. I have a memorandum of the treatment, but I have not got it with me.

Q. You remember distinctly that they brought him home on the 17th of March?

A. Yes, sir; on Sunday.

Q. Your services ended then?

A. Yes, sir; he died here in two days after they brought him home. I was th're when he died.

Q. How long did you treat him?

A. 31 days exactly.

Q. Is this John Graves, the defendant, the man you are talking about having seen there during that time?

A. Yes, sir.

169 Cross-examination by the DISTRICT ATTORNEY:

Q. You say you have a memorandum?

A. Yes, sir.

Q. You left it at home?

A. Yes, sir; I didn't bring it with me.

Q. Did you look at it?

A. Yes, sir; before I came here I did, to see when I treated Hawthorne.

Q. You ought to be able to remember exactly the time you commenced this treatment, if you looked at your memorandum?

A. No, sir; I can not remember when I commenced treating him.

Q. Why not? You looked at your memorandum. You remember it was the 17th day of March they brought him home; how do you remember that?

A. There was some of his friends, several of them, came up after him.

Q. You remember that, independent of your memorandum?

A. Yes, sir.

Q. You have looked at that memorandum to refresh your memory; when did you commence that treatment?

A. I don't remember just the date, but the reason I remember the 17th of March it was on St. Patrick's day.

Q. You treated him 31 days.

A. Yes, sir.

Q. You charged for 31 days' treatment?

A. Yes, sir.

Q. Did you treat him every day?

A. I was there to see him every day, and sometimes twice and three times a day, and every night.

Q. Did you charge him by the day?

A. Yes, sir.
Q. You charged him for every day you were there?
A. Yes, sir.
Q. Thirty-one consecutive days?
A. Yes, sir.
Q. Does your memorandum show that?
A. Yes, sir.
170 Q. Then you ought to be able to tell me the exact day you commenced.
A. By counting back 31 days from the 17th of March you can tell.
Q. How often did you see Graves?
A. I don't remember how often I saw him; I saw him frequently, though.
Q. What drug store was it you sent the order to at Chester?
A. It was sent to a man by the name of Friday.
Q. Is he living there yet?
A. No, sir; there is no drug store there at all now.
Q. You did not think to bring that memorandum with you, I suppose?
A. No, sir.
Q. How big a memorandum was it?
A. A small pocket memorandum.
Q. You could have put it in your pocket as easy as not?
A. Yes, sir.
Q. Do you know anything about a man passing through that country with two mares, bay mares, and a hack?
A. No, sir.
Q. Do you know who this defendant left with when he left; who did he go away with when he left?
A. I don't know.
Q. Where did he start to go to?
A. I don't know anything about when he left there, what time he left.
Q. Describe his wife?
A. His wife was a medium-sized woman, rather heavy built, rather dark complected.
Q. Has she dark hair?
A. I think so.
Q. Black hair?
A. I don't think you would call it entirely black; it is a dark color. I never noticed the woman particularly.
Q. There is sometimes a difference in hair; when it is kept up good and slick it is darker than when it is not combed, is it not?
A. Yes, sir.
Q. You know Mrs. Tapp, do you not?
A. Yes, sir.
171 Q. She knew the lady, did she not?
A. I think so.
Q. She had a very heavy head of hair, did she not?
A. Yes, sir.
Q. How many children did they have?
A. Two with them.
Q. Boys or girls?

A. One boy and one girl.
Q. Which was the oldest?
A. The little girl was the oldest.
Q. How old was the girl?
A. I could not tell you.
Q. About what was the age of the little girl?
A. I would imagine she was 6 or 7 years of age, 7 probably.
Q. How old was the little boy?
A. He looked like he might be a couple of years younger than the little girl.
Q. You think that the boy was four or five years old?
A. Yes, sir.
Q. Have you seen the boy since he was here? Do you not know that the boy is not that old now?
A. I don't know; I have not seen the boy; I don't know anything about their ages. He was a small boy.
Q. Was the boy at his mother's breast?
A. No, sir.
Q. Carrying it in her arms?
A. No, sir; not when I saw it.
Q. He wore pants, did he not?
A. Yes, sir.
Q. How often did you see Mrs. Graves and these children?
A. I don't remember how often I saw them. I saw them there several times.
Q. You never saw them any more after that time you went to the house and found it empty?
A. Yes, sir; I saw them after that.
Q. You have said you didn't; you said to the gentleman on the other side that you never saw them afterwards, but saw them a short time before, at the time you went to the house and found them gone?
A. I don't remember of any such question as that being asked me.
172 Q. Let me read to you what you did say: "I was asked out to see a patient on the 13th day of March, and I came by Graves's, and there was nobody at home, not even Connelley was at home." Then you were asked the question by Mr. Frederick, "Did you see Graves after that?" and you said "No; I never saw him after that, but it had not been a great while before that that I saw him."
Mr. FREDERICK. What I asked him was whether or not he saw him at that time.
The DISTRICT ATTORNEY. I took what you asked him, and that is what you said. (To the witness:) If you had seen him after that, counsel for the other side would certainly have asked you the question. I have it written here that you said you didn't see him after that; that you saw him a short time before. What do you say now? Did you see him after that?
A. I don't remember whether I did or not.
Q. Do you recollect of seeing him after that?
A. I remember of seeing him latter than that in the year.
Q. I mean at that time.

A. I could not be positive.
Q. Anywhere in a few months?
A. I could not be positive I did.
Q. He went away and came back later in the year?
A. Yes, sir.
Q. That is what I mean; we agree now that you didn't see him any more until he came back after going away?
A. I could not be positive that I did.
Q. When did he leave there; do you know anything about that?
A. No, sir.
Q. You do not have any idea?
A. No, sir.
Q. How far did Connelley live from the railroad?
A. I suppose 2 and a half, or maybe, three miles.
173 Q. Is that the nearest place?
A. Yes, sir; Winslow.
Q. How far did Morgan live from the railroad?
A. I don't know anything about that; he wasn't living there at that time.
Q. Did he have any property at that time?
A. Not that I know of.
Q. Any horses?
A. No, sir.
Q. What horses did Connelley have?
A. He didn't have any.
Q. Used oxen, did he?
A. Yes, sir.
Q. Did Morgan have any?
A. No, sir; I never saw any there.
Q. You saw oxen?
A. Yes, sir.
Q. Do you remember when the snow was on the ground that year there?
A. No, sir; I don't.
Q. Do you remember of a big snow, the only snow we had that year?
A. No, sir; I don't remember the time; I remember the snow; there was nothing to call my attention particularly to it.

Redirect examination:

By Mr. FREDERICK. It snows frequently up in that country when it does not snow here, does it not?
A. I expect so.
By the COURT. Did you see the defendant when he came back in the fall?
A. Yes, sir; I seen him when he came back.
Q. Did he have any property then?
A. No, sir; only some baggage.

Here court took a short recess.

174 T. H. WOOLUM, having been duly sworn upon behalf of the defendant, was examined by Mr. C. J. Frederick, and testified as follows, to-wit:

Question. What is your name?
Answer. T. H. Woolum.
Q. Where do you live?
A. At Winslow.
Q. What business are you engaged in there?
A. Farming.
Q. How long have you lived there?
A. I have been there off and on 15 years.
Q. Do you know this defendant?
A. No, sir.
Q. Did you see him before ever?
A. Yes, sir.
Q. Where did you see him?
A. I saw him in Winslow.
Q. When?
A. It was in 1889.
Q. What time in 1889?
A. It was in February sometime.
Q. Do you remember any circumstance that makes you remember it?
A. Yes, sir.
Q. What was it?
A. There was a bartender from this place sick there at the time, Mr. Hawthorne I believe his name was, and I was waiting on him at the house; he was there boarding at father's and Dr. Page was attending on Mr. Hawthorne, and he would not allow Dr. Page to leave him; he was there day and night, and Doctor Page stepped out, and this gentleman came to me and wanted to know if I could sight him to Dr. Page, and I told him he was at Carnahan's drug store at that time. I believe that is all the talk I ever had with him. I saw him several times after that every two or three days at the station, but I never had any talk with him.

Q. Did he state what he wanted with the doctor?

175 A. Yes, sir; he told me that his wife at the station was sick, and he would like for the doctor to go down and see her.

Q. Is this defendant the same man?
A. Yes, sir; I think so, as well as I remember.

Cross-examination:

By the DISTRICT ATTORNEY. What name did he give you?
A. He did not give me any name; I didn't know his name until I asked a party that was there who the gentleman was, and he said it was old man Morgan's son-in-law, and said his name was Graves.
Q. You don't know when that was?
A. I don't remember the date; no, sir.
Q. It has been three years ago?
A. It was in 1889.
Q. You have nothing to impress the date on your mind, have you?
A. No, sir; it was between the 9th and 20th sometime, but I could *no* not say exactly.

Q. How do you know it was between the 9th and 20th?

A. By this Hawthorne being there sick.

Q. How does that impress the date on your mind?

A. It does not except it was in February, between the 9th and 20th that he was there.

Q. If he was there then I suppose your father has some memorandum or books that would tell it?

A. No, sir; I haven't.

Q. Your father had?

A. Yes, sir.

Q. Why not examine them if you were going to be a witness?

A. I had nothing to do with his books.

176 Q. How is it you put it between the 9th and the 20th, just exactly the right time?

A. Because he was sick there at that time.

Q. How do you know he was sick there then?

A. He came there in February about that time; it was that month he was sick; it was some time that month.

Q. He was sick in March also there, was he not?

A. I think so, but I don't know how long in March.

Q. About what time in March did he leave?

A. I could not say.

Q. Did he leave in February or March?

A. I think, as well as I remember, in March.

Q. What time?

A. I can't tell.

Q. Did he leave as early as the second or third of March?

A. I could not say that.

Q. Why do you put it betwe'n the 9th and the 20th?

A. He was sick there in that month.

Q. I know that; if he was sick there that month it might have been between the first and the 28th—February is a short month. Why do you put it between the 9th and the 20th?

A. It was about that time.

Q. Is your father here?

A. No, sir.

Q. He has books that will show when the man came there?

A. Yes, sir; I think so.

Q. These books are not here, are they?

A. No, sir.

Q. You have no other way of fixing it between the 9th and the 20th; might it not have been in March, if he was there in March?

A. No, sir; because I saw this gentleman, off and on, every two or three days before March, and I didn't see him in March at all.

Q. He wasn't there in March?

A. Not that I seen; I did not notice him there; if he was there I did not notice it.

177 Q. I can not understand how it is that you fix these dates, or even the months, in your mind if you have not looked at the books; the transaction occurred three years ago. Is there a snow that you fix it by?

A. No, sir.

Q. Do you remember a snow that year?
A. I remember snows during the year.
Q. Do you remember that there was one, and but one big, good snow?
A. I don't know anything about the snow.
Q. Then you do not fix it by the snow?
A. No, sir.
Q. You remember that Hawthorne was at your place. Is he the only man that ever was sick and boarded at your father's hotel?
A. No, sir; there was several there sick.
Q. How is it, without examining your father's register, you know it was in February he was sick? Why not it be in March or January?
A. He did n't keep any register.
Q. You say that he had books that would show it?
A. Yes, sir.
Q. He kept a boarding house?
A. Yes, sir.
Q. Without looking at these books you undertake to tell us the date and fix it as between the 9th and the 20th?
A. Yes, sir.
Q. Just simply by your recollection?
That is all I have to go by.
Q. You did not see the defendant there any in March. If it had been the 20th of February this thing occured it was only 8 days until March; so you didn't see him any more?
A. No, sir; not that I remember of.
Q. Why not put it between the 8th and the 20th, or the 11th and the 20th?
A. If you see fit to put it that way, all right.
178 Q. Why don't you put it between the 9th and the 18th, or between the 10th and the 20th, or between the 8th and the 20th, or 18th and 19th; why do you select the 9th and 20th?
A. That is about the time I was waiting on Mr. Hawthorne; he was there some little time before I had to wait on him.
Q. When did he come?
A. I don't remember his date, sir.
Q. Then you can not fix it by that? That has nothing to do, then, with the 9th and 20th? When was your attention first called to the fact that this defendant some time between the 9th and the 20th came to your house for the doctor?
A. I don't remember. Mr. Tapp was talking to a party at Winslow I supposed to be a friend of his that he was talking about had been gone, and he came back and wanted to know if I knew him, and I said "I have seen the gentlemen here, but I wasn't acquainted with him."
Q. When was that?
A. I don't remember the date of that.
Q. How long ago was it?
A. It has been probably a month or six weeks ago; maybe longer.
Q. Can you tell what month it was in?
A. No, sir.
Q. Can you tell whether it was between the 9th and 20th of any month?

A. It might be or might not.

Q. It is as important a thing as the mere fact of a man inquiring for a doctor, is it not? You say that Mr. Tapp is the man that was talking to you?

A. No, he was not talking to me; he was talking to a man named Hendrickson.

Q. That was a month or six weeks ago?

A. Yes, sir.

Q. That is the first time your attention has been called to it since three years ago last February?

A. Yes, sir.

Q. You knew that this man was charged with murder, didn't you, having occurred about that time?

A. I didn't at that time.

179 Q. You knew it before you came down here to testify?

A. Yes, sir; I heard it; I didn't know it.

Q. You knew you were a witness in a murder case, and you were to come here to show where he was between the 9th and the 20th?

A. Not for sometime afterwards.

Q. You knew that before you came down here?

A. Yes, sir.

Q. Very well; why didn't you go to your father's books and prepare yourself to testify?

A. Because I didn't think that I needed any books.

Q. You thought you could recollect that a thing occured between the 9th and the 20th, and did not look at the books when you had books that you could look at?

A. I had no books.

Q. Your father had? I don't suppose he would object to your seeing his books, would he?

A. I suppose not.

Q. Who was President of the United States in 1889?

A. I guess the present President now.

Q. You think Mr. Harrison was President?

A. Yes, sir.

Q. Who was Governor of the State that year?

A. I could not tell you; I do not keep posted in political affairs.

Q. Who was sheriff of your county?

A. I think Mr. Combs was.

Q. Do you have a mayor to your city of Winslow?

A. No, sir.

Q. Are you a married man?

A. Yes, sir.

Q. Did you have any children born to you that year?

A. No, sir.

Q. Do you remember what month Thanksgiving came in on that year? Perhaps you never give thanks?

A. I don't keep myself posted on such business. I have got to work, and I attend to my own work.

Q. You live right on top of the mountain, at the hotel, with your father?

A. I did at that time.

180 Q. You do not live there now?
A. No, sir.
Q. W'ere do you live now?
A. About three quarters further east.
Q. Do you know the day of the month the fourth of July came on that year?
A. I suppose I do.
Q. What?
A. It came on the fourth, I suppose, if they have not changed it since that date.
Q. What day of the week did Christmas come on?
A. It comes on different days.
Q. Well, that year?
A. I don't remember the day.
Q. You had never seen this defendant before that time, had you?
A. No, sir.
Q. That is the only time you ever spoke to him, is it not?
A. I only spoke to him once.
Q. I believe you say you do not remember about the snowstorm of that year in January, February, or March, the only snowstorm we had that year of any account; don't you remember that?
A. No, sir.
Q. Mr. Connelley and Mr. Morgan are here, are they not?
A. I think Mr. Morgan is; I don't think Mr. Connelley is.
Q. Where does he live?
A. I don't know where he lives.
Q. Is he alive or dead?
A. I could not tell you that.
Q. When was the last time you saw him?
A. I think it was in 1889, about the time this gentleman was there and went away.
Q. Did he and Connelley go off together?
A. I don't know, sir.
Q. Have you ever seen him since?
A. No, sir.

181 ED. SWEET, having been duly sworn, upon behalf of the defense, was examined by Mr. C. J. J. Frederick, and testified as follows, to wit:

Question. Where do you live?
Answer. I live at Huntington.
Q. How long have you lived there?
A. About three years.
Q. Do you know this defendant?
A. Yes, sir.
Q. Who is he?
A. John Graves.
Q. When did you first see him?
A. I met him in 1879 the first time.
Q. Where?
A. On Gasconade River, in Missouri.

Q. When did you see him next?
A. At Chester.
Q. Where is Chester?
A. Upon the Frisco railroad, in Crawford County.
Q. When did you meet at Chester?
A. That was, I think, as near as I can recollect, the 12th day of February.
Q. Have you anything by which you can fix the date?
A. Yes, sir.
Q. What is it?
A. He came in and got a meal's victuals from me in the restaurant.
Q. Have you got the book with you?
A. Yes, sir; I have the book on which I charged it to him.
Q. Let's see it (witness produces book); what do you find there?
A. He came into my restaurant about 12:00 o'clock, and talked to me about getting a job at the round house, and he spoke to me about Mr. Nummy, and I told him to go and see Mr. Nummy; Mr. Nummy
182 was acquainted with Mr. Henry—I don't know just the exact words, but I can remember these parts of it. I told him to see Mr. Nummy, he was acquainted with Henry, and probably he could tell him more about it than I could.
Q. Henry had charge of the round house?
A. Yes, sir.
Q. Then he got dinner with you?
A. He went off and came back about 2:00 o'clock, I think, as near as I can recollect, and got dinner then.
Q. Did he pay for his dinner?
A. No, sir.
Q. Why did you charge it?
A. He asked me if I would wait until I saw him again.
Q. What entry have you got in your book?
A. "John Graves, one meal, 25 cents."
Q. What date is that?
A. 12th of February, 1889.
Q. Is that the book you kept while you were keeping restaurant?
A. Yes, sir.
Q. Is this defendant here the man?
A. Yes, sir.

Cross-examination:

By the DISTRICT ATTORNEY. This is the book, is it?
A. Yes, sir.
Q. I will ask you to go five pages ahead of that; that is 1888, is it not?
A. Yes, sir.
Q. The next page is 1888?
A. Yes, sir.
Q. This account is 1888?
A. Yes, sir.
Q. And this?
A. Yes, sir.

Q. And that?
A. Yes, sir.
Q. And this?
A. Yes, sir.
Q. This is 1888?
A. Yes, sir.
Q. And this?
A. Yes, sir.

183 Q. Here is 1889, and 1888, is it not; that 1889 put in ahead of the 1888; that is right, is it?

A. Yes, sir.
Q. That is the page on which you find this entry you speak of, is it not?
A. Yes, sir.
Q. Then the next page is 1888, is it not?
A. Yes, sir.
Q. The next page is 1888, and it still runs on?
A. Let me show you the way it is kept.
Q. I see the way it is kept. You have 1888 here, and then here 1889 put in with a different pencil. Isn't it a blacker pencil?
A. You see I never used the same pencil all the time. This is Mr. Essenger's account.
Q. Where did you live in 1888?
A. In Chester.
Q. Where did you live in 1889?
A. In Chester.
Q. Where did you live in 1891?
A. At Huntington?
Q. When did you go to Huntington?
A. I think in 1889, the latter part of 1889.
Q. Did you keep a restaurant at Huntington?
A. No, sir.
Q. What do you do there?
A. I work in a coal bank.
Q. Is this book simply for the restaurant business?
A. Yes, sir; when I got to Hunting I kept some coal accounts in it.
Q. In 1891?
A. Yes, sir; I think it was in 1891; I never noticed it; you can see it there.
Q. Have you any other entry in this book on that date, in February, 1889?
A. I could not say until I looked at it; I think there is.
Q. I find on another page, page 96, an account for 1889, the account of Drake?
A. That is right, I guess.
Q. What time did you say you left Chester?

184 A. I think it was in the latter part of 1889; I am not sure, but in the first of the year if it was in 1890.

Q. Why did you put the entry of this man on the page with Essener's account?
A. That is just the first place I turned to and I put it down.

Q. I see you have got him charged with $25.00?
A. Twenty-five cents, is what I meant.
Q. It is $25.00 put in Essenger's account?
A. Well, I meant twenty-five cents. Has it got the dollar mark?
Mr. MARMON (of counsel for defense). It is in the dollar column, but no dollar mark there.

Redirect-examination:

Mr. FREDERICK. I find here on page 20th, March, 1888 and 1889, Dell account. You say you put this down the first place you came to because there was a space there?
A. Yes, sir.
Q. And because the other page had been settled up?
A. Yes, sir.
Q. This is the correct date, is it, February 12th?
A. Yes, sir.
Q. This is the same man that was there?
A. Yes, sir.

Recross-examination:

By the DISTRICT ATTORNEY. You saw this defendant first on Gascanade River?
A. Yes, sir.
Q. Where is that?
A. That is between the Pacific and the——
Q. In the Rocky Mountains?
A. No, sir; in Missouri.
Q. What part of Missouri?
A. It is just abo*t* the capital on the river, about 20 or 25 miles.
185 Q. Washington?
A. I don't know the name of the place.
Q. Columbia?
A. No, sir.
Q. Baton Rouge?
A. No, sir.
Q. Memphis?
A. No, sir; I know what it is if I could call it.
Q. Jefferson City?
A. Yes, sir.
Q. What was his business there?
A. He was a tie maker—making ties.
Q. How many times did you meet him there?
A. I met him several times after that time.
Q. Do you remember the big snow we had in 1889?
A. I remember several big snows; I don't remember whether there was one in 1889 or not.
Q. Try to think if there was a snow on the ground at the time you saw the defendant at Chester?
A. No, sir; I don't think there was. I don't know whether there was or not.
Q. Do you remember whether it was a nice pleasant day or how it was?

A. I can not tell anything about that, whether it was a pleasant day or not.

Q. How came you to remember that he was there; what is there that makes you remember it?

A. I remember of his being there.

Q. You remember it independent of your books that he was there?

A. Yes, sir.

Q. Tell me whether there was snow on the ground or a pleasant day or not?

A. I have forgotten whether it was a pleasant day or not.

Q. Had you commenced to plow up land yet that year?

A. I do not plow.

Q. Had the farmers?

186 A. I don't think they had; I hadn't noticed anyone plowing.

Q. You do not remember anything about the season; you do not remember whether it was cold or anything about that?

A. I don't remember whether it was cold that day or not.

Q. You do not have any recollection?

A. No, sir.

Q. You just recollect that he came to your house. You remember that, and then you went to your book, and found it was the 12th of February; is that right?

A. I remembered him coming in there and talking to me, and asking me to let him have his dinner and then charge it.

Q. Who first spoke to you about it; how did they find it out?

A. I never knew he was arrested until I come to guard the jail.

Q. You were a guard at the jail?

A. Yes, sir.

Q. How long have you been a guard at the jail?

A. Three months, *growing* on four.

Q. I thought you said you lived in Huntington?

A. I do.

Q. You live there now?

A. I am only a guard; my family is in Huntington now.

Q. And you are a guard at this jail?

A. Yes, sir.

Q. Do you guard him?

A. Yes, sir; when he is there; I have not guarded any, though, since the 12th of this month.

Q. How long have you been guarding him there at the jail?

A. Ever since I have been a guard at the jail.

Q. When you saw him you remembered that he had eaten dinner at your house three years ago, did you?

A. When they spoke to me, I didn't know he was there when I first came there, and they told me that he was there.

Q. Who was the first one that called your attention?

187 A. The first one that called my attention I believe was Joe Winn.

Q. Who is he?

A. He is a guard at the jail.

Q. How come Joe Winn to speak to you about it?

A. He just spoke to me about him being there, and we talked about there being anybody there that I knew.

Q. Where does Joe Winn live?

A. He lives in Washington County, I think.

Q. He lives near Winslow, don't he?

A. No, sir; near West Fork.

Q. He first spoke to you about it?

A. I think he was the first one; I am not sure whether he was. I think it was, but I would not be positive.

Q. You and the defendant talked about it then?

A. He talked to me—I will call back what I said about its being Joe Winn. It was Call Stevens that first spoke to me.

Q. Is he a guard?

A. He is a turnkey. Instead of Joe Winn it was Call Stevens.

Q. Where does he live?

A. At Chester, out on the mountain from Chester.

Mr. FREDERICK. You are no kin to the defendant, are you?

A. No, sir.

The COURT. What did Call Stevens say to you about it?

A. I asked him if there was anybody I was acquainted with in jail, and he said that John Graves was in there, and he asked me if I was acquainted with him, and I told him I was.

Q. Is that all that he said?

A. That is about all.

Q. Didn't he ask you if you had met him, and if he was at your house at a certain time?

A. No, sir.

Q. Did he ask you what you knew about his whereabouts?

188 A. I don't think he did. He never asked me anything about that. Just asked me if I knew him.

Q. That did not refresh your memory as to this date, of course?

A. I just remembered that part of it. Mr. Graves himself asked me if I didn't remember him being at my house after that; I told him that I did, that I remembered.

Mr. FREDERICK. Then you went to your book and ascertained when it was?

A. Yes, sir.

189 GEORGE MUMMEY, having been sworn upon behalf of the defense, was examined by Mr. C. J. Frederick, and testified as follows, to wit:

Question. You live at Chester, Arkansas?

A. Yes, sir.

Q. Do you know this defendant?

A. Yes, sir; I recognize him.

Q. Who is he?

A. He gave his name as Graves. We kept a boarding house then when I first saw him.

Q. When did you first see him?

A. I think in January or February, 1889.

Q. Where did you see him?

A. At our house; he eat there; staid there two or three days; he and his wife and two children staid at our boarding house two or three days at Chester.

Q. Where did he go to?

A. I don't know, sir.

Q. You do not know what date it was in January or February?

A. I don't.

Q. What was he down there for?

A. I never asked him. I was at work, and he was stopping with his wife and children.

Cross-examination by the DISTRICT ATTORNEY:

Q. Him and his wife and two children?

A. Yes, sir.

Q. Did he pay his bill?

A. Yes, sir.

Q. You kept a register, didn't you?

A. Yes, sir.

Q. Where are you living now?

A. At the same house.

Q. Are you still keeping a boarding house?

A. No, sir.

Q. What are you doing now?

A. I work for the railroad company. I did then, too.

190 Q. You do not know when it was that he came there; whether it was in January or February?

A. No, sir; I could not tell; I know it was in the winter of 1889.

Q. Any snow on the ground?

A. I think not; I can not tell.

Q. The big snow was after that, or was it not?

A. I don't know; I didn't pay any attention to him any more than the rest, coming and going.

Q. How long did you run your boarding house after that?

A. Not long.

Q. When did you close your boarding house?

A. We run near a year after that. He was there twice after that, I think; he was there in the spring, and eat a meal or two meals.

Q. The first time he was there was how long after Christmas?

A. I don't know; I could not tell you.

Q. What were he and his wife and children doing there?

A. I could not tell you.

Q. Didn't you find out his business?

A. No, sir.

Q. Was he making ties?

A. I don't know what he was doing; I never seen the man before, and never saw him again until I seen him here, only he came back in the spring and eat a meal or two.

Q. What became of your register?

A. I don't know; the children tore it up, I think.

Q. Your books are destroyed?

A. Yes, sir.

Q. Did you look for them to see?

A. My wife did. She said the children tore them up.
Q. So you do not know when it was?
A. I know it was in 1889.
Q. Some time in the winter; that is about as near as you can come to it?
A. Yes, sir.
Q. You know it was after Christmas?
A. Yes, sir.
191 Q. How long after Christmas?
A. I don't know.
Q. Do you think it was as much as a week or two weeks?
A. Oh, yes, sir.
Q. But you have no idea?
A. No, sir.
Q. The truth of the matter is it has been so long ago you can not remember?
A. I can't remember; I never thought any more about him than any other man eating a meal, going on.
Q. Therefore, of course, you can not tell?
A. No, sir.
192 Mr. FREDERICK (of counsel for defense). I now desire to introduce in evidence this book, referred to in the testimony of the witness Ed. Sweet.

Here court took a recess until 1:30 p. m.

193 AFTERNOON SESSION—1:30 P. M.

Mrs. MARY E. NUMMEY, having been duly sworn upon behalf of the defense, was examined by Mr. C. J. Frederick, and testified as follows, to wit:

Question. You are the wife of George Nummey?
Answer. Yes, sir.
Q. You live at Chester?
A. Yes, sir.
Q. Do you know this defendant?
A. I don't know whether I would have known him or not, but I reckon I do.
Q. Where did you first see him?
A. At Chester.
Q. At what place in Chester?
A. At my place.
Q. What was he doing there?
A. Him and his family came there and asked for board for a few days.
Q. When was it that he was there?
A. In the winter of 1889.
Q. Do you know what month?
A. No, sir; I don't know exactly what month it was.
Q. Was it before or after Christmas?
A. It was after Christmas, I believe.
Q. How long did he stay there?
A. Two or three days; I could not tell just exactly which.

Q. Did he have his family with him?
A. Yes, sir.
Q. Of what did his family consist?
A. Wife and two children, I believe.
Q. Have you seen his wife since you have been here?
A. Yes, sir.
Q. And is she the same lady that was there at your house?
A. Yes, sir.

Q. Is this man the same man?
194 A. I reckon it is. I would hardly recognize the man.
Q. But you recognize the woman?
A. Yes, sir; I knew the woman.

Cross-examination by the DISTRICT ATTORNEY:

Q. You and your husband were keeping boarding house?
A. Yes, sir.
Q. A railroad boarding house?
A. Well, a railroad boar'in*d* house, or for anybody else that came.
Q. But especially for railroad men?
A. No more than anybody else.
Q. Everybody was welcome?
A. Yes, sir; that came and paid for what they got.
Q. Did he and his family sleep there?
A. Yes, sir.
Q. You thin*i* it was in the winter of 1889?
A. Yes, sir.
Q. How long ago was it?
A. Three years last winter.
Q. Who else did you have there boarding with you at that time?
A. I don't know who I had; I hadn't many; had comers and goers.
Q. There was a good many boarding there, was there?
A. Yes, sir.
Q. What room did they occupy?
A. A room upstairs, No. 1.
Q. That was before Chester was made a head of the division, was it not?
A. No, sir.
Q. Was it made head of the division in 1889?
A. No, sir.
Q. As early as 1889?
A. No, sir; it was before that.
Q. That is what I say; it was before Chester was made the head of the division?
A. I don't understand you. Chester was made head of the division before that.

195 Q. When was it?
A. In 1887, I believe.
Q. You remember that as well as you remember the other, do you not?
A. It looks like I would.
Q. Because you went there, didn't you?
A. Yes, sir.

Q. When that was made the head of the division you went there to keep railroad boarding house?

A. I went there to keep boarding house.

Q. You would not have gone unless it had been made head of the division?

A. I don't know whether I would or not.

Q. Where did you go from?

A. Rogers.

Q. Rogers at that time was the head of the division?

A. Yes, sir.

Q. When it was made at Chester you went to Chester?

A. Yes, sir.

Q. How long after you went to Chester was it before you saw this man?

A. It was sometime in the winter, about two years.

Q. How old was his children?

A. I never asked him how old they were.

Q. You can tell something about it; you have had children of your own?

A. Yes, sir; I have got children of my own.

Q. You know about how old a child is when you look at it?

A. I would not know unless I would ask and find out.

Q. You could not tell exactly, but you could tell about its age, you know?

A. Maybe I could, and maybe I could not.

Q. About how old was the little boy?

A. I could not tell you which was the oldest, the little boy or little girl.

Q. You do not know?

A. No, sir.

Q. He had two children, didn't he?

A. I suppose he did.

Q. Don't you know that he did?

A. There was two with him, I think.

196 Q. They were their children, were they not?

A. I don't know whether they were or not.

Q. Why?

A. Because. Don't ask me such questions as that. I don't know.

Q. They passed for their children, did they not?

A. I reckon they did.

Q. They claimed they were their children?

A. I reckon they did.

Q. You had no reason to believe they were not?

A. I had no reason to believe it or I had no reason to dispute it.

Q. Of course I do not mean anything on this; simply want to know if they were with two children they called theirs?

A. I reckon they was.

Q. Why don't you know which was the oldest?

A. I had my work to do, and I was paying attention to my work.

Q. You do not remember whether the children were boys or girls?

A. No, sir.

Q. Were they both girls?

A. I don't know. What do you ask me such questions as that for?

Q. Were they both boys?
A. I don't know.
Q. Was the oldest one a boy or a girl?
A. I have already told you.
Q. You have told me you didn't know?
A. Yes, sir.
Q. Did the oldest one wear pants or a dress?
A. I don't know.
Q. You can not remember that?
A. No, sir; I paid but very little attention to anybody that came and went.
Q. I suppose his wife was a woman, was she not?
A. I reckon she was.
Q. You won't say anything positive, will you?
A. No, sir; what I don't know I am not going to talk about.

197 Q. You won't even say that a person is a woman if you do not know?
A. No, sir.
Q. She looked like a woman, did she not?
A. She dressed like a woman.
Q. Did she have a beard? Didn't have whiskers, did she?
A. No, sir.
Q. You saw her here; this is the same lady?
A. I seen her here; yes, sir.
Q. Had a heavy head of hair, did she not; had lots of it?
A. I don't know whether she has got lots of it or not.
Q. How do you know this is the same woman?
A. Because I remember the woman.
Q. Why is it you do not remember the man?
A. He does not look exactly like he did then, and I would not have known that man if I had met him on the street.
Q. He has not got the same kind of beard, has he?
A. I do not think he has.
Q. His beard was shorter then?
A. I think it was.
Q. He had a mustache then?
A. I think so.
Q. Did not have any whiskers?
A. I don't know that he had; if he had they were very short.
Q. You seen the children here; do you recognize them?
A. I have never seen them; that is all I know about it; I don't know anything more; I did not know that until I was asked.
Q. You found it out after you were asked?
A. I hardly knew it after I was asked, because I paid no attention.

198 Q. The truth of the matter is you do not know anything about it; there was a man and woman and two children came there and staid there a day or two at your house, just a little after Christmas, in 1889?
A. I don't know whether it was just a little after Christmas or right smart awhile after Christmas.
Q. What do you think?

A. It was in the winter after Christmas.
Q. Was there snow on the ground?
A. I don't know.
Q. Was it cold weather?
A. Yes, sir.
Q. Was plowing going on?
A. We do not often plow in Arkansas in cold weather.
Q. Then you do not know anything about this case?
A. No, sir; not much. I don't want to know much.

199 SAMUEL FELLNER, having been duly sworn upon behalf of the defense, was examined by Mr. C. J. Frederick, and testified as follows, to wit:

Question. You live in Ft. Smith?
Answer. Yes, sir.
Q. How long have you lived here?
A. About growing on to 10 years.
Q. Did you know Frank Hawthorne?
A. Yes, sir.
Q. Where did you know him?
A. He was in our employ?
Q. He is not living now?
A. No, sir.
Q. When did he die, do you know?
A. To the best of my recollection it must have been somewheres in April, 1889?
Q. Had he been away from Ft. Smith before his death?
A. Yes, sir; he was up at Winslow under the care of Doctor—I have forgotten his name?
Q. Page?
A. No, sir; another doctor there from here—Dr. Dunlap. I don't know Doctor Page; perhaps he may have attended him, but not within my knowledge.
Q. Do you know when he came back from Winslow?
A. I could not give you the date from the simple fact I was East. He came here in the month of March when I returned from the East.
Q. That is March, 1889?
A. Yes, sir.
Q. Do you know when you returned from the East?
A. Some time in March, during the latter part of March?
Q. Your brother is not here?
A. No, sir.

Cross-examination:

By the DISTRICT ATTORNEY. When did you go East?
200 A. I left the latter part of January, 1889.
Q. Where was Mr. Hawthorne then?
A. He was up at Winslow then.
Q. When did he go?
A. In the early part of January.
Q. Dr. Dunlap is a physician who has spent his life in this town?

A. Yes, sir.
Q. An old physician here; a physician of ability?
A. Yes, sir; to the best of my knowledge.
Q. Dr. Dunlap at that time had bought a home at Winslow, had he not?
A. Yes, sir.
Q. He was there?
A. Yes, sir.
Q. And this young man went there to be under his charge, did he not?
A. I presume so.
Q. That was your understanding?
A. Yes, sir.
Q. Doctor Dunlap had treated him here, had he not?
A. That I could not tell.
Q. At any rate Dr. Dunlap had lived here and knew him?
A. Yes, sir.
Q. Hawthorne was your bar-keeper?
A. Yes, sir.
Q. Do you know Page?
A. No, sir; the only thing I know about it is I was informed that Dr. Johnson—Couchy Johnson's son—had brought him down from Winslow in a very low condition. I was surprised because I was under the impression that he was well by that time.
Q. When you got here in March you found him at home?
A. Yes, sir.
Q. He left here in the early part of January?
A. Yes, sir.
By the COURT. Did your house pay the doctor bill?
A. I believe nobody paid the doctor bill.

Q. Was a bill ever presented to your house of any other doc-
201 tor than Dr. Dunlap?

A. I believe there was; either for treatment or for medicine furnished. I don't remember now exactly when, but this is my impression. I believe I have a record in my cash book there of between five and ten dollars, if I recollect aright.

The DISTRICT ATTORNEY. Your cash book would show?

A. Yes, sir; if I could get at the names, the receipts, I could furnish it. It strikes me some bill was presented a year after his death, and we said we would pay it.

Q. Did this young man have any property besides his wages?
A. No, sir.
Q. I presume he consumed what surplus wages he had during his sickness?
A. More than that.

Mr. FREDERICK (of counsel for defense). You allowed his salary to run on during his sickness?

A. Yes, sir; for over three months, and then contributed towards the expenses arising from his funeral and so forth.

202 Defense rests.

203 The United States then recalled Charles L. Tapp in rebuttal, who testified as follows:

204 *Government's rebuttal.*

CHARLES L. TAPP, having been recalled by the Government in rebuttal, was examined by the district attorney and testified as follows, to wit:

Question. You stated on the stand that the defendant lived with Connelley?

A. Yes, sir.

Q. Where does Connelley live now?

A. I saw him at Rudy as I came down here.

Q. Does he live there?

A. I suppose he does. That is my understanding; that he lives near there.

Q. He is a brother-in-law of this defendant and at whose place the defendant lived?

A. Yes, sir.

Q. Morgan is here, the father-in-law of the defendant?

A. Yes, sir.

Recross-examination. Mr. FREDERICK:

Q. I will ask you if Connelley is friendly to Graves?

A. My understanding is he is not.

Testimony closed.

205 The court permitted the district attorney, in his closing argument to the jury, to comment on the absence of the defendant's wife from the presence of the court, stating, among other things, that the defendant's wife ought to have been sitting by the side of her husband during the trial, so that the witnesses for the Government could see her and identify her as the woman who was said to have been with the defendant in the Indian country before the unknown man's remains or bones were found, and other like arguments, statements, and declarations.

To which statements to the jury the defendant at the time objected, which objections were by the court overruled, to which ruling of the court the defendant at the time excepted.

The court charged the jury as follows:

206 In the District Court of the United States within and for the western district of Arkansas, May term, A. D. 1892.

UNITED STATES } *vs.* JOHN GRAVES. } Murder.

Charge of the court, delivered Friday, July 29th, 1892, 1:50 p. m.

PARKER, J.

Gentlemen, the defendant in this case stands before you charged with the crime of murder. You have heard the facts that have been offered in the case, and from which you are to ascertain the truth or falsity of this

charge. You are required, of course, to go to the law as given by the court to ascertain of what the offense consists. You take that definition of the offense and you measure the evidence by it, and in that way you get at the result called a verdict. You are to find the nature of this charge; what facts *a* are essential to be established to show, first, that a crime has been committed such as is charged, and then, secondly, that the defendant is the author of that crime.

The very first proposition to be ascertained in a charge like this is whether or not the crime as charged has been committed by some one. That is called in the law the corpus delicti—the fact that a crime such as is charged has been committed. Now, to ascertain that certain things are necessary to be found, the very first thing to be established, the
207 very first proposition to be proven is the fact that this unknown man, who is named in the indictment as a man of that character—that is, a man whose name to the grand jury was not known—is dead. That is a requisite that must be proven, because there can be no crime of murder proven unless there has been some one murdered, some one proven to be dead. Now, the ascertainment of that proposition of course requires the establishment of another proposition that is very closely connected with it, and that is that he died by violence of the character named in the indictment.

And, again, there is another proposition that goes to make the corpus delicti that is connected with those that I have asserted, and that is that this violence was inflicted wilfully and with malice aforethought. These three propositions—first, the death of the party alleged to have been killed; second, that he was killed in the manner and by the means named in the indictment; and third, that this manner was applied, or these means used, wilfully and with malice aforethought, make up the crime such as is charged in either of the counts, or both counts of this indictment. The first count charges that the defendant committed the crime of murder by using the weapon named, a club, which the said defendant, John Graves, then and there had and held in his hand, and that he produced this result by striking, beating, and bruising the unknown man upon the head, of which wounds so inflicted he died. It is alleged, I say, in this connection, that this party was unknown. The same allegations are made in the first count of the indictment as are made in the second, except that it is set out in the second that the weapon with which the beating,
208 striking, and bruising was done which produced the wounds that resulted in the death of the unknown man was done with an instrument that was unknown to the grand jury. You will understand that when it is impossible to find out the name of a party who may be killed in such a way as to make it murder, that we are not to stop the administration of justice because we can not find out his name. That man may be unknown to us, yet he is a member of society, and he is entitled to the protection of the law as fully as though he was personally known to us, and if it is established that somebody has murdered him, that person is not to escape justice because we are unable to find out the name of the party. You see, the law does not do anything unreasonable. It does not say to us to enforce its provisions for the protection of society, and then say that in many cases it is rendered impossible to enforce it because you can not find the name of the party who is killed. It may be alleged that

the name was unknown to the grand jury; that is, that they were unable by the testimony they had before them, testimony produced by the Government after using reasonable means to ascertain his name, and yet it was impossible to find it—to find his name—and they then set out that his name was unknown. And the same with reference to the weapon used in producing the deadly result. When it is impossible to find that, as it is in may cases, as all evidence of the use of violence may be so far obliterated and destroyed as that it is impossible to tell the character of the agency used to produce that deadly result, the law says you may then allege the means unknown. It frequently happens that at the time of the investigation of the case by the Government before the grand
209 jury by the exercise of reasonable means upon the part of the Government it is impossible to ascertain the name of the party killed, especially when that party is a stranger passing through the country, and yet it may turn out afterwards before the case is tried that a knowledge is obtained that produces a conviction as to what the name was. In this case there seems to be no evidence offered that goes to show what the name of the party was, and that produces the reasonable conclusion that it was impossible for the grand jury to arrive at the knowledge of his name. It has even been impossible after this full investigation of the case before you to ascertain his name, and you can readily presume it was impossible for the grand jury investigating the case to ascertain what it was.

The first inquiry then, is, is that unknown person dead? In this caes it is necessary, of course, to have proof of the identity of some person who was killed—not the name of the party, but evidence that there was a party in life whose life was destroyed in such a way as to make the crime of murder. That is a fact to be established, and it may be established just as is established the fact that there was violence used of the character named in the indictment to produce that result. Both propositions may be proven by circumstances alone, by circumstantial evidence alone. The identity, in this case, must be established of these bones; that they are the bones of the man who is alleged to have been killed, for the reason that the facts offered here to show the use of the violence to produce that result, together with other circumstances and other facts, constitute the connecting link between the man who was alive and who is alleged by the Government now to be dead, and the fact that he was killed by violence, or in a murderous way. Therefore, I say, they are to be identified
210 as the bones of the man who is alleged to have been killed. As I have already told you, the first thing necessary in this case to be established is the death of this unknown man. That must be done, that must be proven, because if he is not dead, this controversy is ended. You can not convict a man for the killing of another unless that other has been killed, and this involves an inquiry in this case into the question as to the identity of these remains which were found at the place described by the witnesses, because if these remains are not the remains of the unknown man, the man alleged to have been killed, whose name was unknown to the grand jury, and is not known to us, by the light of this evidence, of course there could be no further proceedings in the case; you would have to stop in the performance of your duty right there. The other proposition that we must have and that must exist in connection with this one,

is, that this unknown man died by violence of the kind described in the indictment. Now, the violence described is, that it was done by his being beaten to death with a club, or that he was bruised or struck with a club, and that these wounds produced his death; or, as set out in the second count of the indictment, that the means producing that result are to you unknown. As far as the allegation of means is concerned, as set out in the first count of the indictment, it is not necessary that you should be satisfied that it was done with a club, actually. If the proof shows to your satisfaction, beyond a reasonable doubt, that it was done with any other blunt instrument, such as the pole of an ax, or such as anything else that would produce bruised or contused wounds, such as would pro-

211 duce this fracture of the skull or breaking of the skull—if you believe it was broken—is responsive to the allegation of the means used as set out in the indictment, because weapons, in the eye of the law, are divided into classes. If they are of the same generic kind as some other weapon, and if they would produce a like result as some other weapon, that is sufficient. For instance, a club would produce a bruised or contused wound, and you can be beat to death with a club; so you can with the pole of an ax, with a sledge hammer, with a singletree, or any other instrument that would produce a wound of that character, and they all belong, in the eye of the law, to the same family, just as much as the pistol belongs to the family of the gun, or the gun to the family of the pistol, or the ax to the family of knives, or knives to the family of axes.

Now, you can find, if you are satisfied from these circumstantial facts that the weapons producing the death of this unknown man was of a blunt character, that it produced a bruised or contused wound by striking, that that is responsive to the allegation of the means used. When you have found these two propositions, we have found so much as is necessary for us to learn to enable us to come to a correct conclusion. If these remains were the remains of the unknown man, it is a physical fact that we may take as established, that the man is dead, because we know that his remains could not be in that condition without it following as a necessary conclusion, that he is dead. Now, that requires us to ascertain how we may identify these remains.

212 This is a case like hundreds of others that occur in the administration of justice in this country, where you can not look upon the face of the dead man, or look into it, and say that it is the face of a certain party, because the face has been destroyed; it no longer exists; and right here the question becomes pertinent, how then, are to establish the identity of the party? How are we to ascertain that? You see a man alive that you are acquainted with; your friend; a man that you have met often. You can look into his face, and from the nature of that face, its form, or appearance, and its very cast, its features, its lineaments made up of a number of things combined, you can swear to the identity of the person from that face, and from this combination of things that produces a certain appearance, and this combination as it is illuminated by the light that comes through the windows of the soul, his expression and the intelligence that exists in the human mind, that beams out through the face, you may know him. You can look into the face of a friend or acquaintance, and you can name him as a man of a certain name that you know.

Now, when a man dies, this illuminating power that is connected with the human mind, and has come from the mind, disappears, and necessarily the human face while it is preserved until it is decayed, or until it is destroyed, only presents the general outline that it had when the party who possessed it was alive. There is something about it in life that is gone forever; it is destroyed, and you will have a little more difficulty in recognizing the face of a dead man, although he may be an
213 acquaintance, yet, as a rule, you can generally recognize him by his face. But suppose his face is gone and the body is entirely destroyed, what then are you to do? If a man has been murdered, the rights of society and its members have been trampled upon by a brutal assassination, are you to make no effort to discover that crime and punish the criminal, because the identity of the remains, or of the person, by the means I have named, can not be ascertained? Not at all. You can go to the means that are extraneous to the body of the person. You can, in other words, fall back upon that evidence that is so often and so generally and usually relied upon, called circumstantial evidence, to ascertain that fact. Now, what is meant by circumstantial evidence? What is the fact to be proven in this proposition that I have named? Why, that these remains were the remains of the missing unknown man. That is a proposition that if a man would come before you and say, "I looked at the dead body; I saw it, and from its face, its form, its appearance, I know it," just as these witnesses here who are offered upon the part of the Government, identify the defendant as the party who accompanied the unknown man, tell you that they know him. One remarkable instance of the means of knowledge is that given by the lady who testified here, who enumerated half a dozen means by which she could identify the defendant—his eyes, their nature, their appearance, and the character and form of the face; and from his body, and above all, from a certain expression of his eye. As I have already told you, about a living person, we can recognize it from a combination of things, as the character of the nose, appearance of the eyes, the shape of the mouth, and
214 general appearance and outline of the face of the party, and all these things, which are illuminate by the soul, by that which comes the mind. Of course when there is an opportunity of that kind, identity may be made in that way by the party having looked at and observed the man, and being able to recollect what they did observe at that time, and to tell it to you. That is the case where they tell you that they saw the persons, and from his face and his form and his appearance, they knew it. That is called positive evidence, and, commonly speaking, it is called evidence of that character. It is an opinion, of course, but it is regarded as so close to the proposition necessary to be established, as to be recognized as positive evidence. We can gather together a number of facts, standing around this proposition, although they are only known as circumstances, things standing around the main proposition to be proved. That is the definition, that is what circumstantial evidence, or circumstances, comes from; circum-stare—standing around; things which stand around the occurrence, the proposition to be proved. If you can get a number of them, they are just as effective, if they are sufficient in their proving power to satisfy beyond a reasonable doubt, the minds of reasonable men, as though it were this other kind of evidence, coming from a man who says he looked into the face of the dead man, and by that means recognized him.

Now, supposing the dead body, or its remains, to have been discovered; the next step in the proof of the corpus delicti, that is the fact that
215 a crime has been committed, called murder, is the identification of such body or remains as those of the person charged to have been slain. Mr. Burrill, an eminent writer upon the subject of circumstantial evidence, says:

"Where the body is found, shortly after the commission of the crime, and the face has not been disfigured by the violence employed, or by accident, or in the natural course of decay, the identification is made in the form of direct and positive proof of the fact by those to whom the deceased is known. But where the features have been destroyed the body may be identified by circumstances, as by the dress, articles found on the person, and by natural marks upon the person. In Colt's case, where a considerable portion of the face had been beaten in by blows, and the progress of decay had otherwise rendered direct recognition impossible, the body was identified in this way. In McCann's case, where the face of the deceased had been eaten away by the hogs, identification was effected in a similar manner. Even where nothing but the skeleton has been found, it may sometimes be identified by peculiar marks, and by objects discovered near it. In the case of Rex v. Clews (4 Carrington & Payne, 221), the body of a man, after the lapse of 23 years, was identified by his widow, from some peculiarity about his teeth, and by a carpenter's rule and a pair of shoes found with the remains and also identified. But in examining skeletons, great attention should be paid to their anatomical characteristics, upon which the important fact of the age and sex of the person depends, as these may be decisive of the whole case in favor of the accused.

"Where the body has been purposely mutilated, and especially where it has been dismembered with a view to its destruction, by fire or otherwise, its identification becomes a matter of greater difficulty, the head being usually de*stroy*ed first, for the very purpose of preventing recognition, but it occasionally happens that even the agency of fire, which is generally selected as the readiest and most effectual means of destruction, proves inadequate to the purpose contemplated. In Webster's case, the head of the deceased had been placed in a furnace, and exposed to a strong heat for a considerable time, but some blocks of mineral teeth resisted the action of the fire so effectively that they were identified by a dentist as part of a set of artificial teeth which had been made for the deceased, and which the latter wore at the time of the disappearance. Some other portions of the body, which had not been subjected to the action of the fire, were also identified by peculiar appearances. A case is mentioned by Mr. Wills, in which the remains of a female, consisting merely of the trunk of the body, from which the other parts had been cut, were identified by a curious train of circumstantial evidence, embracing several facts of conduct on the part of the prisoner."

Mr. Wills, on circumstantial evidence, further says:

"It is not necessary that the remains should be identified by
216 direct and positive evidence, where such proof is impracticable, and especially if it has been rendered so by the action of the party accused. A man was convicted for the murder of a creditor, who had called for the payment of a debt—"

This was the case of the killing of Dr. Parkman by Webster, but it is not the case he alludes to here. It is a case very similar—

"and whose body he cut in pieces, and attempted to dispose of by burning. The *a*fluvium and other circumstances alarmed the neighbors, and a portion of the body remained unconsumed, sufficient to prove that it was that of a male adult, and various articles which had belonged to the deceased was found on the person of the prisoner, who was apprehended putting off from Black Rock at Liverpool, after having ineffectually attempted to *a*bude justice by drowning himself. * * * The identification of human remains has been facilitated by the preservation of the head and other parts in spirits; by the anti-putrescent action of the substances used to destroy life; by the similarity of the undigested remains of food found in the stomach with the food which it has been known that the party has eaten; by means of clothing or other articles of the deceased traced to the possession of the prisoner, and unexplained by any evidence, that he became innocently possessed of them; by means of artificial teeth and by means of other mechanical coincidences."

It may be well in this connection to note the language of Chief Justice Shaw, who presided upon the trial of Webster for the killing of Parkman, when he was put in the lab'ratory of the furnace and burnt up. He said:

"This leads to the more direct and material question whether these were in fact the remains of Dr. Parkman.

"There was evidence tending to show that when these parts were brought together and laid in juxtaposition, measuring those which were found and estimating the size of those which were missing, they corresponded in height*h* and figure with those of Dr. Parkman. The result of this analysis and admeasurement are given in the testimony of the medical witnesses, especially of Dr. Wyman, and the report which, without objection, was submitted to you. Mr. Shaw, a relative of Dr. Parkman, who had known him long and intimately, examined these remains and says they very much resemble those of Dr. Parkman. They correspond in height*h* and size and in the color of the hair on the breast and legs and there is nothing dissimilar about them from what he knew of Dr. Parkman, and he took charge of them as his remains."

"Here is one of those cases to which the rules of evidence apply, to which I call your attention in speaking of circumstantial evidence.
217 If this testimony had alone been relied on as proof of identity, though tending to create a strong probability it would have left that fact still doubtful, because parts of the body were wanting, such as the head, including the features of the countenance, the parts by which the identity of a person is usually established. But certainly this is not the only mode in which identity may be proven, and in this case had there been marks upon the portion of the body found and they could have been shown to be natural or artificial marks existing upon the body of Dr. Parkman they would have tended to make out that point."

And the judge says if that testimony had been relied upon alone it would hardly have been sufficient—that is, from the parts found—giving an opinion as to whether they could correspond to the size of the body that was to be identified.

"Then the evidence arising from the teeth is relied upon. And if the proof derived from this source is of a more conclusive kind to establish

the identity of these remains with those of Dr. Parkman, then the fact that the remains corresponded in height, figure, color, and general appearance with the person of Dr. Parkman, though not specific and direct enough of itself to prove identity, yet being consistent with and not repugnant to it, would, to that extent, tend to make out that point and corroborate the identification.

"You are next called to consider the proof arising from the remains of the set of artificial teeth found in the furnace as bearing on this same matter of identity."

Mr. Wills says further with reference to this matter of identification:

"Identification is often satisfactorily inferred from the correspondence of fragments of garments, or of written or printed papers, or of other articles belonging to or found in the possession of parties charged with crime, with other portions or fragments discovered at or near the scene of crime, or otherwise relating to the corpus delicti, or by means of wounds or marks inflicted upon the person of the offender."

This shows, and the purpose for which I have read it is, to show you when you can not have evidence such as would come to you from the witness who stated that he knew the man by his face, by his appear-
218 ance, when you have not that sort of testimony that is denominated positive testimony because of its nearness to the main proposition to be established, then you can rely upon these extraneous circumstances such as the clothing, or such as articles found about the person—such as any extraneous thing that goes to show the identity of the missing man with the one that was seen by these people there, because if there is to be a case here, he must be found to be one and the same person, and these remains must be shown to be his remains.

Now, you will understand from what I have read to you upon this point that this proposition of the law and all other propositions that go to make up the crime of murder or any other crime may be proven alone by circumstances. You may ascertain the identity of this man with these bones or the fact they were his bones by circumstances alone. It is one of the methods that you have to get at evidence of this character, and you generally must depend upon that method, especially where there has been the destruction of the remains or an attempt to destroy them, or they are left by the party taking the life of the party whose remains they were in a condition where the hogs or other animals might destroy them. You then must rely upon circumstances to satisfy you of the identity of the party with the man who was missing or with the party named as the unknown man. When these circumstances are of sufficient proving power to produce a conviction in your minds that the proposition is true, whenever it is established to that degree of certainti*t*y that you would require it to be established outside of the jury box that part of
219 the case is proven.

Then we come now to the evidence of violence as means given us by which we are to come to a conclusion as to whether the parties life was taken, and if so, whether it was taken in the way described in the indictment, or by means unknown to us, one or the other in this case, because there are two counts, and we may find under either. If we are satisfied by marks of violence upon his skull, if that is proven to us by the condition of the skull produced in evidence, this being the means that is allowed

us by law to get at that conclusion, to get at that result, to find that proposition as true, and if these marks of violence are of that character to show to us that reasonable degree of certainty called proof beyond a reasonable doubt, that the man died by violent means either known, and if so, of the character named in the first count of the indictment, or unknown, as described in the second count of the indictment, that establishes that proposition. In addition to that we are required to be satisfied that this act of violence which produced the death of the party was an act that was inflicted wilfully and with malice aforethought. If inflicted in that way the man was murdered by somebody, and as I told you in the beginning that is the first general proposition that is involved in the charge of a crime of this character, first to find if a crime such as is charged was committed by some one, and then we are to find whether or not the party on trial is the party who committed that crime.

220 Now, the second proposition in this connection with this crime of murder, is whether this act was done wilfully, legally speaking, or in legal contemplation, and with malice aforethough. These expressions in the law have a legal meaning, a meaning attached to them by which we are bound, and we must understand exactly what is contemplated by these expressions. We have less difficulty, of course, in contemplating their meaning, when we are called upon to apply them to a state of case where we have the evidence of the violence which produced the death, and there is no explanation of the use of that violence, but on the contrary there is shown in addition to that evidence of violence an effort to conceal all evidence or all proof of the death of the man than we might have if other conditions existed, because we could make an application almost instinctively of the condition of murder to that state of case, and make no mistake about it, because when acts of that kind are done, as we know by observation in life, that indicates strongly that the author of those acts was a man who did that which under the law was murder, for the reason that men don't act that way who are guilty of no crime. As a rule men do not employ acts of violence of such a character as to produce deadly results upon human life, and do not undertake to destroy the remains by concealment or by burning them, if they are innocent of any criminal purpose, if there is no criminal purpose connected with the doing of that act.

Now it is necessary to go to the law to ascertain what this expression "wilfully" means, and what is meant by "malice aforethought." You will understand in this very kind of a case I have given you, and if you are satisfied that the proof shows it to exist here, that the unknown

221 man was killed by blows on the head, that his skull was crushed, the body was put away, covered up, and the brush, etc., was fired that was put on top of the body, you would know without much definition about it, that that evidenced a criminal design, of a degree to make out all these elements that go to make up the crime of murder, if they are unexplained. It is barely possible that a man in self-defense might take another's life, and undertake to conceal the remains, because of a dread or fear of something of that kind, but it is not a usual course of action, such as characterize men generally. It is necessary for us to go to the law to get a definition of these expressions, "wilfully" and "malice aforethought." When is an act which results in death said to be done wilfully, by the law? The word "willful," as used in connection with the charge

of murder, such as is preferred in the indictment against this defendent, means an intentional killing, and not an accidental killing. It means an act which results in death that is intentionally done, and one that is not accidentally done. Now there is a great difference in the law between that which is accidental, and that which is intentional. The law fastens intent to every act that it not an accident; every act that produces death that is outside of the definition of the word "accident" is intentional, in the law, whether it grows out of a specific design to take life, or whether it grows out of gross carelessness, or whether it arises from the condition of mind that prompts the possessor of that mind to be engaged in some other wrongful or criminal act, and in the execution of it, a life is taken,
222 provided it is a wrongful or criminal act, which from its nature, and the way it is executed, as a natural and probable and reasonable result death may ensue from the execution of the unlawful or criminal act. That which is an accident, in the law, is something which occurs after the care that the law requires to be exercised to prevent its occurrence.

Now let us understand in this connection that the law enjoins upon us certain great duties, the highest of which is a regard for life, and not only that, but that we shall protect it, and we are commanded by the law to observe the care that is necessary to protect life, whatever it may be, as depending upon the condition surrounding each case. Of course they vary. We are handling, for instance, an instrument or weapon that is not necessarily dangerous, that does not usually produce deadly results; we are not required to exercise the amount of care in handling that that we would a weapon that is made for the purpose of taking life, or with a weapon with which death can be easily or readily produced. I call your attention to that to show you that the care is relative. Now, whenever we fail to exercise that amount of care that the law commands us to exercise, the law fastens intent to what we do, and it, therefore, says to us that the act is willful. It may not be as specifically intentional, or as specifically willful in one case as in another, and it may not be so criminal, yet it is a willful act, and there is some degree of crime attaching to it, either because of our negligence, or because of our specific design to com-
223 mit a criminal act, such as taking life when we purposely do that. A man, for example, strikes another over the head with a deadly weapon.

It does not matter, as far as you are concerned, when you are called upon to investigate that act whether the party had the purpose of robbery, or what purpose he may have had, if he makes the blow wilfully, if he strikes the blow intentionally, and if the blow is of the character that it would naturally and reasonably produce death, and does produce it. That is a wilful act upon his part. If the act is done intentionally it is a willful act, and if it is done without just cause or excuse it is criminal willfulness. When a man exercises the amount of legal care exacted by the law, and something occurs beyond that, that is not his willful act. The law recognizes that he does not do it willfully. But when he does an act which naturally or reasonably or probably, from its nature and the way it is done, produces a certain result, that is held to be an intentional result, because the act as done in that way is intentional; and whenever the act is done, and it is an act that may naturally or probably produce a certain result, whenever the act is done intentionally the result is intentional.

For example, if a man presents a gun at another and fires it at him, the fact of drawing the gun and presenting it shows that he wills what he does, shows that that act is a wilful act upon his part, and when that state of facts exists, the act of presenting and firing the gun is recognized by common observation and common experience as a wilful act. If that act produces death, because there is a known connection between the act and the result which is probable, which is usual, and which is reasonable, the party is said to have intended the result, and consequently to have
224 willed the result. Now, intent is something that can be found only by inference. Now, we are hunting for intent. The question as to whether the act was wilfully done or not is a question of intent. It can only be found by the circumstances in the case, by the nature of the act done, and the way it was done, and the character of the weapon used, bearing in mind that the law holds every man to know the nature of the weapon that he uses, the purposes for which it is constructed, and the results that naturally and reasonably are produced by it. That is recognized by the law as a matter of common knowledge within the mind of every man who has arrived at the years of discretion. For that reason when a man presents a gun or a pistol at another, and shoots it at him, the law says he intends to kill him, because the killing is a result that is natural or probable or reasonable.

So in a case of that kind, when you are called upon to find whether he intends to kill or not, you find first whether he presented the deadly weapon in shooting distance of him, and fired it at him, whether that was a wilful act, and when you find that (as I have told you) from the character of the weapon used and the manner of its use, because the weapon can not use itself; it can not present itself; it can not pull its own trigger; it can not, of its own accord, or of its own will power, because it has none, send the deadly missile in the body of the man who is killed; there is an intelligent will power that does all that; I say, when you find a gun or a pistol has been held in that attitude, and that it has produced a deadly result, as reasonable men, as men of common knowledge, of common observation, you must come to the conclusion that the party wilfully did that act, and
225 when he wilfully does an act of that kind he wilfully produces the result. A word in this connection as to how you may find how the act was willfully done.

The presumption that the law recognizes is that a man is held to have intended the natural and ordinary consequences of his act. Every sane man, who is a voluntary agent, acting upon motive, must be presumed to contemplate and intend the necessary, natural, and probable consequences of his own acts. If one voluntarily or wilfully does an act which has a direct tendency to destroy another's life, the natural and necesary conclusion from the act is that he intended so to destroy such person's life. So, if the direct tendency of the willful act is to do another some bodily harm, and death, in fact, follows as a probable consequence of the act, it is presumed that he intended such consequences, and he must stand legally responsible for it. So, where a dangerous and deadly weapon is used with violence upon the person of another, as this has a tendency to destroy life, or to do some great bodily harm to the person assailed, the intention to take life or to do him some great bodily harm is a necessary conclusion from the act. You take the act done. Your common observation teaches

you that a deadly weapon, when used in a certain way, will jeopardize life or destroy it. For that reason you have the right to take the fact of the use of a deadly weapon into consideration; you have a right to take the particular part of the person upon which that weapon was used into consideration; and you have a right to consider the character of the weapon. You may consider its character from the evidences of its use, from the fact that the skull was crushed by it, or from any other fact that shows it was a weapon with which life could be easily or readily taken.

226 Wherever you have a case showing that it was used in that way, and there is no explanation of that use, there is nothing going to show that the party who used it had a right to use it under the law in that way in his own self defense, when there is nothing which mitigates the use of it, from the facts which show its use in that way, which show that it produced a deadly result of that kind, you would have a right to infer, first, that he produced that resul'; and second, that that result so produced was a willful result upon the part of the party who used the weapon, because, in a case of that kind, when no human eye sees the use of that weapon, when no human eye saw the character of that weapon, when you can look at it only by the light of the consequences produced by it, by the light of the condition of the remains of the skull of the party upon whom it was used, you have a right to infer from such consequences, from such facts, that the weapon was first, I say, of the character that produced that deadly result, and that it was willfully used.

Now, there is something else that must exist. I have told you what is meant by "willful." I have told you when it is done in such a way as to produce a deadly result it is an act of that kind, and an act which is known as a willful act—that is, it is not an accident, not something that occurred beyond human control or beyond human prevention, but something that was produced by the mental condition of the party who produced it. You take the act that makes up the first element of the crime of murder; it is not the distinguishing feature of that crime; it is not the chief characteristic of that offense that it is done willfully, but the chief characteristic is that it was done with malice aforethought; and we are called upon,

227 in this connection, to find out what is meant by that expression as used in connection with this case. It is something that originates from the mind of the party doing the act. Then we are to find, as in the case where we are looking to ascertain whether or not it was done willfully, and as in the case where we are to rely upon the consequences as evidence alone of the character of the weapon used, and also the proposition as to who used it—we must go again to that character of testimony called circumstantial evidence; we must find some other way of getting at the truth, of coming to a conclusion, than by relying upon positive proof, because we can not find positive proof in a case like that. When you come to the mental condition that is necessary to be ascertained you can not find positive proof; it is impossible to prove what the condition of his mind is or was by positive evidence. It is impossible to find whether it was inflamed by the condition known as malice aforethought in the law or whether the act was done void of any such condition as that, by positive evidence. You can not learn it in that way, because we can not fathom the human mind; we can not penetrate its inmost recesses to see what is going on there. We must therefore adopt some

other means that are reasonable, some other process that is rational, to get at the mental condition of the party, because both of these characteristics of murder, to wit, wilfully and with malice aforethought, spring from the condition of the mind of the party. The law says we may do it by circumstances. We may do it by reason of the character of the act done, the manner in which it was done, and we may solve the condition of the mind by the light of the facts and circumstances that surround the act going to characterize it, to show what manner of act
228 it is, bringing to bear upon a condition of facts of that kind the observation of men of mature judgment, of men of intelligence, of men who, because of the amount of information they possess, are to the greatest extent qualified to discharge the great and responsible duties devolving upon them as jurors.

As I have remarked to you before, when malice aforethought exists, murder exists. Now, let us see what is meant by that; let us get an understanding of it if we can; let us comprehend it fully, that you may make a proper application of it to the facts in this case. If the facts show that it exists in this case, or that the life of the unknown man was willfully taken, and this other element surrounded the transaction known as malice aforethought, the killing of the unknown man would necessarily be murder and nothing else. Now, what is this element of this crime? It is defined by the law in a general way to be the doing of a wrongful act without just cause or excuse, in such a way and under such circumstances as to show that it was done wrongfully, and that it was done in the absence of that which would give the party the right to defend against it; or that it was done in the absence of mitigating circumstances. And it is defined again as the doing of a wrongful act without just cause or excuse, and in such a way as to show that he who did it had a heart void of social duty and a mind fatally bent upon mischief. Let us see how the law defines it, and then again how the law tell us it may be found to exist. It can only be found by circumstances because malice aforethought, like willfully, is something which exists in the mind that is necessary to be found to make up the elements of this case, and as you can not get into the mind to know what is going on there (and you could not tell
229 what was transpiring there if you could get into it), you must learn it in some other way; some way that rational men would adopt, because you are not authorized to adopt any other method than that which is reasonable in arriving at conclusions, and there is a reasonable way, which is the way that the law recognizes as a proper way, by which men may arrive at conclusions. It is from the nature of the transaction, the nature of what takes place, the character of the thing done, and all the surrounding facts and circumstances that you are authorized to take into consideration to see what was the nature of the thing done, whether it was an innocent act or a criminal act, and if a criminal act what was the nature of that criminal act.

Malice aforethought is the grand criterion with distinguishes murder from other homicide, and it is not so properly spite or malevolence to the deceased in particular as any evil design in general. A man goes out and kills another to rob him, to get his property, get his team, his wagon, horses, or his money, if he has any. He has not got any special spite against him. He has that general malevolence against all men that so

debases and depresses his moral qualities as to prompt him for the sake of gain, for the sake of lucre, to take human life, but he does not do it in that spirit of vindictive wickedness and personal malignity that often occurs where men in anger because of a fancied or real wrong received take life. He does not do it for that reason, but he is prompted by a spirit of general malevolence, out of which germinates malice aforethought, because it is a condition of the mind that may spring from passion, that may spring from hatred, that may spring from personal animosity, from a desire
230 to seek vengeance for some real or fancied grievance, or it may spring from this unholy and wicked soil called general malevolence. It springs from that when a man kills for the sake of robbery, for the sake of gain. The law says it does not so properly mean spite or malevolence to the deceased in particular, as any evil design in general. A man has an evil design when he purposes to rob another. If he executes that evil design to the extent of taking the life of the party who stands in the way he executes a purpose that has in it malice aforethought. The law says it is not so properly spite or malevolence to the deceased in particular as any evil design in general; the dictate of a wicked, depraved, and malignant heart; a purpose to do a wicked act; and it may be either expressed or implied in law. Express malice is when one with a sedate, deliberate mind, and formed design, doth kill another, which formed design is evidenced by external circumstances discovering that inward intention, as lying in wait, antecedent menaces or former grudges, and concerted schemes to do him some bodily harm. So in many cases, when no malice is expressed, the law will imply it, as when a man willfully poisons another. In such a deliberate act the law presumes malice, though no particular enmity can be proved. And if a man kills another suddenly, without any or without a considerable provocation, the law implies malice, for no person, except of abandoned heart, would be guilty of such an act upon a slight or upon no apparent cause.

Malice is an intention to do bodily harm; a formed design to do mischief. It has also been defined as a deliberate intent to kill. It does not import especial malevolence towards the individual slain, but also
231 includes the case of a generally depraved, wicked, and malicious spirit; a heart regardless of social duty, and deliberately bent upon mischief. It imports premeditation. Therefore, there must logically be a period of prior consideration; but as to the duration of that period no limit can be arbitrarily assigned. The time will vary as the minds and temperaments of men, and as to the circumstances in which they are placed. A man without just cause, or in the absence of just provocation or mitigating facts, conceives a purpose to kill another, and he instantly then and there, momentarialy upon the conception of the thought executes it. That is thought of beforehand; that is premeditation, as much as though it had been contemplated for a year, a month, a day, or an hour. In this age, when we have such easy means of destroying human life, done with such rapidity, done so quickly, that the destruction of the life may occur cotemporaneous with the conception of the purpose, and yet there is a condition out of which springs premeditation, and that we may find it from that condition. The deliberate selection and use of any deadly weapon shows premeditation whether it is a gun or a club or any other weapon with which life can be easily or readily taken. The law therefore

says: The human mind acts at times with marvelous rapidity. Men have sometimes seen the events of a life time pass in a few minutes before their mental vision. Thought is sometimes referred to as the very symbol of swiftness. There is no time so short, but that within it the human mind can form a deliberate purpose to do an act; and if the intent to do mischief to another is thus formed as a deliberate intent, though after no matter how short a period of reflection, it none the less is malice.

Malice is an intent of the mind and heart; the doing of a wrong-
232 ful act without just cause or excuse, or in the absence of that which justifies the act, or which reduces the grade of the crime. Whenever a wrongful act is done without just cause or excuse, and in the absence of mitigating circumstances, which produces death, it is murder, whether it grows out of special spite or animosity, or a specific design to take life, or the purpose to do some other act of a wicked and malignant and criminal nature, which, because of its nature and the way it is done, a human life is taken, malice aforethought exists, because that is the doing of a wrongful act without just cause or excuse which results in death. It evinces a formed design to do such mischief as may deprive a fellow-being of life.

Malice is an intent of the mind and heart. There is never presented to a jury direct evidence of what was the intent of the man's heart at the time.

We now come to how the law says it may be ascertained. We must have some means of finding its existence, and if it has any existence it is in the mind, and is intangible to us as long as it exists there alone; it is a thing to which we can not apply any one of the five senses until it ripens into an act. We are necessarily, if we are to find its existence at all, to go to the act produced by it to find the condition of mind that produced that act. If the act is of the character that by our common observation there was behind it a purpose to do a wrong that may result in death, that purpose was a premeditated purpose. If it is a purpose to rob, to take the property of another, and from doing that which would enable the party to take it death may result, it has malice aforethought in it, because it is the doing of a wrongful act without just cause
233 or excuse which may result in death, and whenever that condition is established, although it is not necessary to establish it to make a case of murder, it is not necessary to prove what the motive was, in order to show that a party committed a murder, because like many of these other things that are hidden, that are in the recesses of the mind of the party alone, it is impossible to get at what motive may have been in existence, what motive may have actuated the doing of the act; and because of the impossibility of ascertaining it you will learn from the law that I will read to you presently that it is not necessary you should find it. If you can find it, it becomes evidence in the case that may show the identity of the party charged with the one who committed the act, and it may show the character of that act, because if it be a purpose to rob, if it be a purpose to commit that high crime, one of the elements of which is violence to the person, or by putting a person in fear by threatening violence or by actual violence, in which the very means of executing it shows that, if death results from the execution of it or that it may be executed, there is a state of case out of which grows malice when the purpose is to commit robbery.

You can not tell by direct proof, bearing in mind the distinction between the two kinds of evidence, positive or direct proof, and circumstantial evidence, whether malice exists or not. Positive or direct proof is the proof which shows the existence of the very thing itself that you are hunting for.

If, for instance, it becomes necessary to show that A shot at B, and C comes in and says he saw A shoot at B, that is positive evidence of
234 it, positive proof of the shooting, of the fact necessary to be found, and because the evidence is so near to the thing itself, it is called positive evidence of it; when it is further off from that thing, but is still evidence standing around the thing done, it becomes circumstantial, or, in other words, circumstantial evidence. Circumstantial evidence is proof that may be equally cogent, and equally powerful proof of the existence of the thing, but it is not the thing itself, but is that which shows its existence in the shape of the surrounding facts and circumstances, in the shape of that which attends every transaction in life; which goes to characterize it one way or the other; which goes to show either that it was a criminal act, a criminal transaction, or that it was a transaction that was honest and upright and void of crime.

There is never presented to a jury direct evidence of what was the intent of the man's heart at the time. He is the only possible and direct witness to that, and if he meant so to testify he would plead guilty. The existence or nonexistence of malice is an inference to be drawn by the jury from all the facts in the case. The emotions of the heart, the processes of the mind, are to us, or to any one outside of the individual, exhibited by the acts which the individual performs, and you are entitled to infer what his intent was, what were the processes of his mind and the feelings of his heart, by a careful study of the acts which he performs, and all the other external indications which he may have given of what his state of mind and heart was. As an eminent text writer has
235 put it, there is no case of malicious homicide in which malice is not inferred from attendant circumstances, no case in which it is demonstrated as express.

It can not be demonstrated as express.

We have no power to ascertain the certain conditions of a man's heart. The best we can do is to infer his intent more or less satisfactorily from his acts. Now, a person is presumed to intend what he does. A man who performs an act which he knows will produce a particular result is from our common experience presumed to have anticipated that result and to have intended it. Therefore, we have a right to say, and the law says, that when a homicide is committed by weapons indicating design, then it is not necessary to prove that such design existed at any definite period before the fatal blow. From the very fact of a blow being struck we have a right to infer as a presumption of fact that the blow was intended prior to the striking, although at a period of time inappreciably distant, and thus we frequently find the statement laid down in reported cases, and by text writers, that malice is to be inferred from the use of a deadly weapon.

Malice is to be inferred from the attendant circumstances which surround the transaction, and the jury have a right, and it is their duty, to look at these attendant circumstances to see what the character of act it was, to see what the condition of the mind of the party or the parties who

engaged in that act, as being the only way that they can arrive at the conclusion as to whether it was an act accompanied with malice aforethought, or the converse of that, in which there was an absence of that element of the crime of murder.

236 Now, anything that shows deliberation, anything that shows a premeditated purpose to do a wicked or willful act that might result in death, is evidence that may be considered by the jury as evidence of malice and of the existence of malice aforethought.

For instance, the law lays it down as a principle, if premeditation is shown, if the purpose to kill directly existed in the mind of the party or parties who killed, or the purpose to do a willful act that might result in death is shown by the actions of the party to have had a previous existence, an existence prior to the time of the killing, that shows the existence of malice aforethought, provided there is an absence from the case of that state of facts which goes to show the party had a right to do what he did do. The law lays it down that the deliberate selection and use of a deadly weapon shows premeditation, shows that the act was thought of beforehand, and whenever a party enters upon whatever unlawful or criminal enterprise he may enter upon prepares himself with a deadly weapon with the purpose of using it in a wicked or unlawful enterprise, if it be one of that character, enabling him to consummate and carry out that enterprise, the selection of a weapon for that purpose is evidence of the existence of malice aforethought, is evidence of the existence of a purpose to do a wrongful act without just cause or excuse in such a way as to show that the party who does it has a heart void of social duty and a mind fatally bent upon mischief.

That is the general definition of malice. It shows a purpose to do a wrongful act without just cause or excuse. That is the way you are to find it. You go to the killing; you ascertain how the killing was produced, the way it transpired, the way it was done; you see what

237 character of weapon was used; you see whether that weapon was prepared before hand, whether it was deliberately and willfully used at the time, and in a state of case where the evidence shows that the killing was willfully done, if there is an absence from the case of that which shows that the party had a right to so willfully kill upon the law of self-defense, or that the killing was willful, but there were mitigating facts attending it, the proof which shows it was willfully done shows it was done with malice aforethought, and in a case of that kind the very same degree of proof that establishes a willful killing would establish a killing with malice aforethought. Now, these are the two elements which make up this crime, that the act was done willfully, and done with malice aforethought.

I say to you that you are to find in this case that this unknown man was killed, either by the means set out in the first count of the indictment, or if you are satisfied it was by means unknown to you, and you find a verdict of guilty in this case, your finding would be appropriately under the second count of the indictment, but if you are satisfied from the circumstances, such as the broken skull, and this attendant evidence that goes to show that it was done with some blunt instrument producing a contused wound of the character of the one produced by striking or beating, you may find under the first count of the indictment. And I say if you find

its existence you have found the first cardinal proposition that enters into this case, to-wit, that the crime of murder exists as is charged, and that the crime of murder was committed by somebody. Of course that does not complete your labor, because you can not yet make this condition concrete; you can not apply it to the case before you; you can not
238 apply it to the defendant until you have ascertained whether or not under the law the evidence shows beyond a reasonable doubt, as it must show every proposition, that he is the party who committed that crime. If it does show that state of case your duty in the premises is plain. It would be to find a verdict of guilty. If it does not show it, or if it does not show either one of these propositions or both of them beyond a reasonable doubt, your duty is equally plain to acquit the defendant.

Now we go to the case where we are to look at the evidence to see whether or not the defendant is the party who committed that crime, and in doing that we are to find, if we can, from the testimony, whether the defendant had an opportunity of committing the offense by reason of his proximity to the missing man; whether he was in company with him, and if so at what time; whether he was last seen with him; and in that connection, if he was last seen with him, whether he has explained his presence with the deceased in such a way as to destroy any presumption that might arise from his connection with him at that time. If you can, either by positive proof, or by circumstances such as the possession of articles belonging to the deceased, or the fruit of these articles in the shape of other property, if you are able to find that he had a motive for this act, it is your duty to find it, but it is not necessary that you should find it to enable you to find either the existence of malice aforethought, or that he was the party who committed that act. And in this connection it may be well to call your attention to what the law says upon the subject of not being able to find a motive, that is, whether or not when we are unable to find this condition of mind that prompts the terrible act called murder
239 we are to let the wheels of justice stand still and stand idly by witnessing the perpetration of these outrages on human rights because it is impossible to find what prompted the party to do the act. That would be nonsense, foolishness, because there are many cases where the evidence is sufficiently strong to satisfy a reasonable mind that the crime of murder was committed and that a particular party committed it, and yet we are unable to find the existence or motive. And we are often unable to find it for two reasons. In the first place it may be so secret, so hidden in the perpetrator's mind we can not drag it to the light of day. And again it may be so trivial, it may be so insignificant when judged from the standpoint of innocense of intelligent men that we overlook it. You understand that it is hard for a man of good purpose, of moral purity, a man of pure heart, to contemplate the condition of depravity which overcomes a man who willfully and wickedly destroys human life. He is incapable of judging the insignificant motive that may prompt the man of that kind of a mind to commit a terrible act of that nature, because he is apt to weigh the minds of other men in the balance from his own conception of his duty to his fellow-men. He is therefore very apt to overlook the motive that in his judgment appears so insignificant; it may be so trivial that it is scarcely possible for a man like him to conceive that there can be any of mankind so depraved or any human heart so degraded as

to prompt its possessor to commit a crime like murder for such a motive. I say if it can be found by the light of the testimony, if jurors are able to ascertain its existence, it may become potential evidence in the case
240 to show the character of the crime committed, to prove that it was deliberate, thought of beforehand, that it was premeditated, and consequently an act of murder; and it may be potential evidence to identify the party who committed that crime.

Now, the question in this case is to ascertain whether the defendant in this case is the party who took the life of that unknown man, if we have found these other propositions to be true. To determine that, it is your duty to look at all the facts and circumstances in this case. First, you are to look at the case to see whether the defendant had any motive for the killing or not, not that it is necessary to prove the motive, because in the language of the law I have already substantially given to you it is frequently so hidden in the mind and the breast of the party who commits the crime that we are unable to drag it to the light of day, but it is your duty to see whether or not there was a motive which produced that result, or what was the motive which prompted the man to act in such a monstrously wicked way as to take human life. If we were to expect that that motive was adequate to that crime, of course we never could find any such crime, because there is no motive adequate to the crime of willful, wicked murder. There ought not to be any motive that is adequate in the mind of any man from the standpoint of self-interest alone, because when he consults that what is there in this world in proportion to the wickedness of the act, or that can repay him for it after he has committed it? If you please, throw the moral part of it out of consideration altogether. It is not necessary to find the existence of motive. If you do find it, it simply becomes that much more evidence in the case.
241 If we find an act done by a particular party, and under such circumstances as to show that it was done willfully and with premeditation, that there was a formed design to do the act, to produce the result, it matters not if there was no motive existing or that can be found. There always is a motive; you can not always find it, however. Now, let us read from the charge of a judge in a case tried in New York a few years ago, where he speaks of this question of motive:

"No man commits a crime without some motive leading him to it. That motive may be strong or weak. You are not to inquire whether the motive is one that ordinarily would lead to the commission of the crime charged. It is difficult for the mind that is fortified by the consciousness of its own rectitude to conceive of an adequate motive for any crime."

Why should any man intentionally violate any law when that violation only brings to him suffering, misery, and direful consequence? If a man pursues a life that is honest, upright, and void of crime, and secures greater happiness by that character of life than the converse of it, why should he pursue the converse of it? Why, if he is but rational, if he would but reason from the proper stand point, the great study of his life would be how to keep upon that line of duty to others. Yet men disregard this; they become criminals; they trample upon this law, and because they do it, for your sake, for your safety as well as the safety of your fellow-men, the law says penalties have to be paid, a forfeit is to be exacted from all those who trample upon the rights of others. We find it to be true that

men, by upright courses, by an honest course, by a conscientious regard of the rights of others, secure more happiness to themselves than by
242 an opposite course of conduct. A man disregards that fact, and in the light of his own happiness and his own self-interest he becomes a violator of the law. Therefore, we are never to look for adequate motive, because we can not find it, for the commission of any crime. In the language of this law—

"You could not be moved to take the life of your fellow-man except in the just defense of your own lives and rights, and the just defense of the rights of those whom it is your duty to defend. But just defense is no crime."

"It is sometimes argues, is it likely that one man should kill another for so small an article? Are we not to infer when there is a homicide which is followed by the stealing of a mere trifle that the homicide was the result of sudden passion, rather than lucri causa? Or for a mere prejudice or spite is it likely that one man will assassinate another, and thus expose himself to the gallows? No doubt when a tender mother kills a child, or a friend kills a friend, and nothing more than the fact of killing is proved, we may be led to infer misadventure, or insanity, from the motivelessness of the act. We have no right to make such inference because the motive is disproportionate. We are all of us apt to act on very inadequate motives; and the history of crimes shows that crimes are generally committed from motives comparatively trivial. A man unaccustomed to control his passions, and unregulated by a religious or moral sense, exaggerates an affront or nourishes a suspicion until he determines that only the blood of the supposed offender can relieve the pang. So also for the smallest plunder, murders have been deliberately executed. We have an illustration
243 of this in the trial of Muller in England, in 1873, for the murder of Briggs. Briggs' watch was seen by Muller in a railway car. Briggs was asleep; the watch was exposed; and Muller killed Briggs by a sudden attack, and succeeded in making his escape. He was afterwards arrested, convicted on circumstantial evidence, and before execution confessed the homicide with the motive. Until the confession the justice of the conviction was largely criticised, on the ground that the stealing of a watch was not a motive that could explain a murder so bold, so cruel, and the chances of exposure so great. But the reply to this is obvious: Crime is never logical. Where the laws are executed with ordinary certainty all crime is a blunder, as well as a wrong. If we should hold that no crime is to be punished, except such as is rational, then there would be no crime to be punished, for no crime can be found that is rational. The motive is never correlative to the crime, never accurately proportioned to it. Nor does this apply solely to the very poor. Very rich men have been known to defraud others on mere trifles, to forge wills, to kidnap and kill, so that an inheritance might be theirs. When a powerful passion seeks gratification, it is no extenuation that the act is illogical, for when passion is once allowed to operate reason loosens its restraints."

Now, whether the motive be a desire for gain or the satisfaction of some real or imaginary wrong, we can not find one powerful enough to be denominated as correlative or proportionate in the mind of an honest man, in the mind of a man who controls that mind in such a way as to keep it

under proper moral restraint, so that it recognizes its moral obliga-
244 tions, and its legal duties to others. When it ceases to be under that restraint men become reckless, and it will consequently cause them to look upon life as a comparatively trivial thing; they will take life for a less consideration, and less motive *than* would the man who is governed by moral restraint, whose mind is governed properly. If you can find the existence of motive, so much the better. But whether you find it or not, if the other facts and circumstances in the case show the guilt of the accused beyond a reasonable doubt, it is your duty to find guilt, and you need not stop to hunt for a motive or to find that it was correlative or proportionate. You never can find it. You will not find any motive of that kind according to your mind, because you are honest men; you are men whose hearts are under proper moral restraint; you are men whose minds cause you to recognize your obligation to your fellow-men. And consequently the law recognizes motive, if you can find it, as being evidence; but for the reason that the motive may be *overlooked*, and because of its trivial character and its inconsiderable nature, it does not require that it should be found by a jury. It is sometimes impossible to find it. Because of the difficulty in ascertaining it you are not to look for it, but when you do find it then you have one proposition that you may take into consideration that is pertinent to the inquiry as to whether the defendant is the party who committed the act or not.

Now, with the existence of the motive to prove that he did it other things must concur to show that fact—that is, whether he had the means or weapons with which the crime was committed at the time of its commission. That may be proven by positive evidence or circum-
245 stances. That is the second consideration that you are to look at, and whether from the evidence in the case the means were applied by him; if there was an application of these means to produce the result. The Government says that he had an opportunity; it claims that he had the means with which to do it as evidenced by the result. It offers evidence here for the purpose of showing that he had the opportunity as well as for the purpose of showing in that connection that the unknown man was killed, was murdered. He says, upon the contrary, by his plea of not guilty, that he did not do this act; that he did not have the opportunity, and he undertakes to establish by the evidence of witnesses offered in the case what is called in the law an alibi—absence from the place of the commission of the crime, and such absence as to make it physically impossible for him to have committed the act. Now, the issue as to his guilt or innocense of course stands upon that state of case. All of the Government's evidence that is offered in the case that is accusatory, that tends to show his identification, that he was associated with the missing man, that he was seen with him, putting him in a position where he may have had an opportunity to have disposed of him by death, is in contradiction to this testimony that is offered to show that he did not have an opportunity.

This alibi, to be effective, in the first place, must be established so as to be credible, and when established it must be of that character to show that at the time of the act, whether it was upon the date given by these Government witnesses that they were seen together, or some later day, but that at the time of the killing, if it did occur, that he had an opportunity of

doing that act, the alibi to be effective must show that at that time
246 he did not have that opportunity. And you will bear in mind in this connection that both of these sets of witnesses may be mistaken as to the particular days given by them. They may not be mistaken as to other facts, and their testimony in that regard may be entirely inconsistent; that is to say, that the witnesses who are offered here on the part of the Government, and who swear to the identity of the defendant as the man who was with this missing man, or the man claimed to be the missing upon the part of the Government, and the man they offer to show you is the missing man by means of these extraneous circumstances—circumstances extraneous of the body, such as the boots, and the evidence of the teeth, etc.—I say the evidence may be reconciled in this way. These men may be mistaken honestly as to the particular date offered by them as the time they saw them together. The other men may also be mistaken as to their dates, and these Government witnesses could be honestly mistaken and yet have seen them together, and the man could have been murdered after they were together. That would be a state of case that would not be in want of harmony with the evidence offered on the other side showing the alibi.

An alibi, to be effective, to amount to a defense, to put a case in an attitude where a defendant is protected by it, must be of a character to make it physically impossible for him to have been with this man at the time of the killing. That is the point that is at issue—the time when the party was killed, and whether or not this defendant was the party who committed that act. Now, this evidence that is offered as alibi testimony is evidence that is always competent to go to a jury, but it is evidence that is to be viewed with a great deal of scrutiny, for the reason given by the law. If it is credible, if it appears to be a state of
247 case that made it physically impossible for the party to have been with the missing man at the time of the killing, it is effective in the law, and one of the most effective defenses that can be offered; but if it is not credible, either because it is forged wilfully or because of an honest mistake, then it ceases to be effective, although the evidence supporting it may be truthful—the facts may be credible. If they are not of a character to make it impossible for the party to have been at that place at that time, then it is not valuable; it does not have the effect of showing that he was not the party, or may not have been the party. Now, a word or two as to how the law regards a defense of this kind.

Of course, one of the material averments in this indictment is that the defendant then and there took the life of this missing unknown man, the man whose name was unknown to the grand jury, and that is a fact that must be proven like any other fact in the case, beyond a reasonable doubt—that at the time and place of this killing he took the life of this unknown man. That allegation in the indictment is inconsistent with the defense of an alibi. The defense of an alibi is not only inconsistent with the allegation in the indictment, but also with the proof that is offered to sustain that, as that it becomes material to be considered to ascertain whether it is inconsistent with the proof that is accusatory. The law says that this defense is of all others the most decisive when duly substantiated or established, yet it is the easiest defense to fabricate and the most difficult to be disproved. An alibi that is not circumstanced as proof

amounts to but little. Its value depends upon the way it is circumstanced; that is, the witness or witnesses must be able to give you a detailed statement of such circumstances as to lead
248 you to believe it is true, and that the defendant could not have been at the place of the killing at the time of the killing and participated in it. A witness may be able to give you a set of circumstances which may have occurred, which may be true in every respect, and the falsehood may be only in applying them, either purposely or by mistake, to a different time, or date, or hour, than that in which they occurred, and if this is done by mistake, it constitutes a failure of the facts as proving facts, and if it is done willfully it is a contrivance by which pleas of alibi are made very difficult to disprove and so easy to fabricate? Because this is true, and because of the liability of witnesses to honest mistakes as to times or dates when things occur, and because it is so easy to fabricate a defense of this kind, a defense of that nature is often resorted to and is often attempted to be sustained and made effective by fraud, subornation, and perjury. Because a defense of this kind can with comparative ease be made effective by means of fraud, perjury, and falsehood, and the ease with which defenses of this kind can be fabricated, the proof offered to sustain an alibi must be submitted by you to a rigid scrutiny. In considering the strength of evidence necessary to sustain the defense of alibi it is obvious that all the testimony tending to show that the accused was in another place at the time of the killing of the unknown man is in direct conflict with that which tends to prove that he was at the place where the crime was committed at the time it was committed and actually assisted in its commission. There is this inconsistency between this evidence—that is, provided these parties are not mistaken in dates. If they are mistaken in dates, either one of them, you can reconcile that
249 inconsistency by putting the party at one place at another time, and at the place over here where the killing was done, if you believe the evidence establishes it. It is your duty, upon this point especially, to look closely to all the facts and circumstances that show his presence at that place at the time that the man was killed, whether it was on the specific date given by these witnesses or at some other date. You are to look at all the facts and circumstances that may be offered as identifying the defendant, whether they offer you facts and circumstances outside of their positive *positive* identification of him, because that is positive evidence; the fact they saw him, and that upon the stand they recognize him as the same person they saw by his appearance, by his countenance, by his face, by his eyes, by the general shape of his person, and all these facts, and whether or not there are any other extraneous facts in the shape of the identity of his family with the family that they saw. These are facts that go to corroborate his identity as testified to by these witnesses.

Then you are to look at the character of these witnesses; whether they are intelligent; whether they are reasonable; whether their testimony seems probable in its own light, or in the light of the other identifying witnesses who are offered in the case or in the light of other extraneous facts that are offered as means of identification. Then, in looking at this character of an alibi you are to see what the means of knowledge upon the part of the witnesses offered for that purpose were; whether or not they

might not be mistaken as to dates; whether or not there is anything in their statements suspicious, such as the failure to produce original
250 record books, or original entrys—facts of that kind.

You are to see what the nature of that alibi is; whether it is true nor ot, and if true even then, if it is consistent or not with the theory that at the time of the killing he was in the Indian country at the place of the killing, and that he therefore took part or committed this crime. Of course the fact of opportunity alone does not make a man guilty of a crime, because men frequently have opportunities of taking life, yet do not do it, but in that connection you are to look at the other facts and circumstances in the case to see whether or not he is the party who did take the life of this unknown man. These facts are to be looked at in this way. It is a rule of the law that if there are inculpatory facts offered against the party, and he does not explain away these facts, when, if they were not facts, and he could explain them away by the means of other witnesses, and he does not produce that evidence, the law says that is a foundation for a presumption against him. When a fact that bears upon him personally is brought to his attention, and it is such a fact that you think that he may reasonably be expected to explain, and would explain if he was innocent, that is, if it may reasonably be supposed that the explanation was within his power, and he fails to produce it, then that is to be taken into consideration as bearing against him, just so far as you think that failure is inconsistent with innocence and indicative of guilt. If it is true in this case, that he could have shown by his father-in-law, or by his brother-in-law, or by any other witnesses, a state of case that would have the effect of destroying this evidence offered as accusatory evidence upon the part of the Government, and he does not avail himself of that
251 means, then you are to take it in the light given you by the law I have just read, so far against him as you think from all the circumstances such a presumption is entitled to in the light of that condition which confronts him.

Now, gentlemen, I have given you the general propositions of the law that have been invoked in this case. It is claimed upon the part of the Government that he is guilty of this crime; that all the material and essential propositions that go to establish guilt, that go to make up the crime, have been established, have been proven beyond a reasonable doubt. It is claimed upon the part of the Government that he had the opportunity, that he had the means to execute the purpose; that the missing man has not been accounted for; that he was in his company, and that he fails to make any explanation of what became of him; that he fails to make any explanation of whether or not he left in company with him up in this state near the tunnel on the Frisco railroad, in the light of the declarations made, as proven by these witnesses, that they had come from the tunnel, and in the light of the evidence that is offered here on his own part, showing at one time that he was at the tunnel or near there, engaged in the work of cutting ties. I say you are to take into consideration all these facts; you are to gather up all the accusatory facts in the case and see what their combined weight is; see how far one corroborates another; how far one sustains another, and how far they bring guilt to the defendant, if unexplained. If they bring

guilt of that degree of certainty that would make the crime—that is, show it beyond a reasonable doubt, then you are to look
252 for explanations in the case, to see whether the testimony that is exculpatory; that shows the impossibility of committing the offense; that shows want of opportunity, is of that character to make it physically impossible for him to have committed the crime, if so, then that would leave the case in a condition where it would not be established beyond a reasonable doubt. But, if the whole evidence, when considered in regard to its truthfulness, separating that which is true from that which is false, as considered by you, and if you are satisfied after ascertaining what is true in the case, and what is effective as truthful evidence, or as proving facts in the case; if you are satisfied beyond a reasonable doubt that a crime has been established as charged, it is your plain and solemn duty to find the defendant guilty of murder as charged. There can be but one offense in an act of this kind, because there is no explanation showing a mitigation of the offense. There is no evidence offered to show that if this killing occurred, that it occurred in a state of case where the man could invoke the right of self-defense, or that it occurred by reason of an attack on the part of the party killed, and that the act is mitigated from murder to a crime of less grade. You are not to draw any inferences from the fact that the defendant did not go upon the stand. You may draw inferences from his failure to produce evidence in his power. As I have told you, if he has any evidence that he could avail himself of to show a state of case different from that asserted by the Government, and he fails to produce that, you have a right to infer from that that he does not have it; that any facts of that kind do not exist. That is an
253 inference that you have a right to make, but you have no right to make any inference against him at all, because of his failure to go upon the stand. A man may go upon the stand or not, as he pleases; it is optional with him.

I think I have covered all the points in this case, with the exception of elaborating a little more fully as to the degree of certainty that this case shall be proven. It is not required to be established to a demonstration; it is not required to be proven so you could look at it as you could a problem in mathematics, a demonstration growing out of a mathematical calculation. It is not required to be established that way, because you can not establish these things that way. You can not find them to that degree of certainty. They are incapable of that degree of proof to that extent, because they grow out of human conduct. Men are capable of dissembling; they are capable of deceiving, or covering up their conduct. The case has only to be proven to that degree of certainty that is denominated establishment beyond a reasonable doubt. When it is proven that way, it is regarded as established. Now, what is meant by that? The way to solve that problem that you may understand it, is to put this question to yourselves, each of you, from the light of all this evidence, in the light of the law defining the crime; if this case was presented to you as honest, impartial, and deliberate citizens, outside of the jury box, considering your duty to the community, to believe whenever guilt exists, as effecting any particular man, and your duty always to the individual member, not to believe when
254 there is not sufficient evidence to warrant you in believing, considering it in the light of your moral duty, passing upon this evi-

dence and considering the law defining the crime, and the rules given to you to weigh the testimony, would you believe that the defendant was guilty of this crime, when so situated? If so, you are satisfied in legal contemplation, beyond a reasonable doubt, because, morally speaking, as a citizen, you would have no right to believe when so situated, except when the case is proven to that degree of certainty that you would have an abiding faith of the truth of the charge and you would act upon that. Then, if so, the case is established, because when such a condition is established by the proof, by the evidence, and the law defining the crime, reasonable men believe it, and when reasonable men believe it, it is sufficient them to lead men of like qualities to believe it when they come into the jury box. And when a case of that kind exists in legal contemplation, there is driven out of the case all doubt for which good reasons can be given. All other doubts are to be disregarded, because if you should regard them you would never believe anything pertaining to any proposition in life; they stand before us on every hand; surmises or conjectures can always be found. A doubt based upon conjecture, always exists, but that is not known to the law as a real, substantial doubt of guilt. It is only that kind of doubt that we can depend upon or are authorized to consider in a case of this character.

Now, a word or two as to the rules applicable to the testimony
255 of witnesses and their credibility. You consider the character of the witness, his intelligence, the way that the witness gives his evidence, its inherent nature; that is, whether it seems to be reasonable, whether it seems to be consistent in itself, whether it seems to be probable, and if so, to say how far for these reasons it is entitled to belief. You are to consider what means witnesses have for knowing truths, what opportunities they have to know the facts they give. If these witnesses have reasonable means of knowing the defendant, if they are *a*rational, if they are witnesses of good judgment, if they are witnesses of sound memory, if they are witnesses who seem to be of impartial character, then this evidence as to identity would be entitled to reasonable consideration, would be entitled to weight, would be entitled to belief, until it is overthrown by other evidence of like character. If it is not so overthrown, you would be authorized to take it as true. If it is destroyed by other facts so powerful, and so potential in their proving character as to eliminate these other facts from the case, then you are to consider the case as one not established. And in this inconsistency that exists—and there is a clear inconsistency—if these facts can be harmonized, it is your duty to harmonize them upon the theory of an honest mistake. If you can not, because you are unable to reconcile them you have a right to consider that the witnesses have committed perjury willfully and intentionally, because witnesses sometimes do that. The evidence offered as identifying the party may be or may not be inconsistent to the testimony offered as alabi evidence. If the parties are correct in their dates, then the facts are
256 inconsistent, the one or the other set of witnesses are either honestly mistaken, or they are willfully falsifying the truth. But you may reconcile their statements upon the theory of an honest mistake as to dates, and upon the theory that no witness has a disposition to tell that which is false. If you can not reconcile them it is your duty to find out where the truth lies, because it is upon that you must base your verdict, if you can find one.

You are to give the facts in this case that full deliberate consideration they are entitled to. The application of the law, if a state of murder is proven here, becomes one easy to be made, because there is but one degree of crime in it, and that has been defined to you, and the court has given you the elements that enter into it, so that part of your duty becomes easy; first to find what is the truth of the case, and then make an application of the principles defining the crime to that truth. If the truth shows that the elements of this crime as they have been given to you exists, and exists as affecting this defendant, your duty is to convict him. If they do not exist, or if they do not exist as affecting him—and I say exist or not exist, and that state case of course has reference to the degree of certainty that they must be proven to show their existence, that I have already given to you—if they do not exist, I say, or do not exist as affecting him, he is entitled to a verdict of acquittal at your hands; but if they do exist, by all the evidence being proven to that degree of certainty defined by the law, as proof beyond a reasonable doubt, he is entitled to nothing but a verdict of guilty against him.

257 I ask you to consider the case fully, and to perform your duty, as I am satisfied you will, as best you can in the premises.

You may retire to make up your verdict.

3:45 p. m.

SATURDAY MORNING, *July 30th*, 1892, 9:15 a. m.

The jury in this case reported to the court, and the following proceedings were had, to-wit:

The COURT. I am informed, Mr. Foreman, by a bailiff, that you desire some further instructions. If so, will you indicate upon what point?

The FOREMAN. We would like to be reinstructed in regard to the defense of alibi, and the importance to be put in dates as to both for the defense and the prosecution.

The COURT. There is one fact I forgot to mention yesterday, and that is that the date laid in the indictment is not binding upon the Government. The law regards a crime of this kind as a matter of such importance as that while some date is necessary to be alleged in the pleadings, yet any date may be established. So, the 13th of February, and the date alleged in the indictment upon which this killing took place, is not binding upon the Government; they may prove it was done upon any other date. With reference to the crime of murder any date may be alleged, because there is no statute of limitations running against a crime of that kind.

258 As I told you yesterday the Government charges that in the Indian country this defendant willfully and with malice aforethought took the life of this man who is alleged to have been killed, and whose name was to the grand jury unknown, and whose name, as far as that is concerned, has not been disclosed yet by the testimony. Upon the other hand it is claimed by the defendant that he did not do that, because it was physically impossible for him to have done it at the time it was done. Bearing in mind that that is the material inquiry—that is, the time it was done, whether it was upon the 13th of February or any other date, that is the material question in passing upon this issue that is alleged to be true upon the one hand and not to be true upon the other. The material question is, if you are satisfied that the killing occurred, and a kill-

ing occurred in such a way as to make it murder, whether at the time the defendant had the opportunity of doing the act charged against him by the Government. The Government says that he had. The defendant offers testimony to prove that he had not. The Government offers testimony to prove that he was with the deceased, the missing unknown man; that he was last seen with him; that the man had disappeared, and that afterwards a skeleton was found that, it is claimed by the Government, has been identified by extraneous facts—that is, by facts outside the skeleton, together with the fact that is a part of it—that is, the condition of the teeth—was the skeleton of this missing man, and that this defendant was with him. Now, I say, that is the claim upon the part of the Government, and it offers a number of witnesses, the number you will remember, to establish that state of case. It offers other facts in corroboration of the identity of the defend-
259 ant—that is to say, the identity of his wife, and the identity of two children which it is claimed correspond with the children of the defendant. In opposition to that the defendant sets up what is called an alibi. Now, in that connection, the witnesses, or some of them at least, upon the part of the Government, undertake to give the particular date when this occurred. You are to see whether or not that witness or these witnesses may not be mistaken as to dates, because men are easily and readily mistaken as to dates. That is a fact that is so prominent and so well recognized that a man must be able to give you circumstances that satisfy you that he knows the date that he names. It is so easy for one particular date to slip the mind and another date take its place that the mere recital of a date by any witness, no matter how conscientious or truthful he may be, is a fact that must be sustained by some other facts that are sufficient in their character to lead to the belief that it is true. The material inquiry is the time of the killing, whether the defendant then and there at that time had the opportunity to commit this offense. Of course, if he did not have an opportunity do it, if it was physically impossible for him to do it, he could not have been with the missing man; it would have been physically impossible to have killed him. He claims that he was not there at the time of the killing. He claims it, and he offers as a defense a set of facts that are claimed to make up what is called in the law an alibi. An alibi to be effective, to have force with twelve reasonable minds, must establish such state of case as to show at the time that the act was done that it was alleged the defendant had an opportunity of doing, that it was physically impossible for him to be there at that
260 time, and to have taken part in the act.

To be effective, I say, it must show that state of case. To show it, it must show it in a truthful and reliable way. It must be void of that condition that would lead state of case asserted as an alibi where it could not be believed, but it must be believed, and when believed it must show such to a state of case as to show at the time of the killing the defendant was not there, and could not have taken part in it—that he was elsewhere. This defense of an alibi is wholly inconsistent with the allegation in the indictment that the defendant then and there killed this unknown man, and the law says this defense is of all others the most decisive when duly substantiated or established; yet it is an easy defense to fabricate, and the most difficult to be disproved. An alibi that is not

circumstanced as proof amounts to but little. That is to say, there must be circumstances and reasons given that are satisfactory that go to show that the parties who undertake to give dates are not either honestly mistaken about it or that the dates are not purposely fabricated. If they are honestly mistaken as to dates that is a thing that may happen with the best of men and with the most conscientious people. Men are mistaken every day as to the day of the week or month upon which things occurred, and because of the ease with which mistakes of that kind may be made by the best of men, by those who have the best of recollections, the statement of a date must be circumstanced; that is to say, reasons that are satisfactory in your judgment must be given to lead you to believe that the party knows whereof he speaks when he is speaking of a particular date. An alibi that is not circumstanced as proof amounts to but little.

261 Its value depends upon the way it is circumstanced; that is, the witness or witnesses must be able to give you a detailed statement of such circumstances as to lead you to believe it is true, and that the defendant could not have been at the place of the killing at the time of the killing, and participated in it.

A witness may be able to give you a set of circumstances which may have occurred which may be true in every respect, and the falsehood may be only in applying them, either purposely or by mistake, to a different time or date or hour than that in which they occurred, and if this is done by mistake it constitutes a failure of the facts as proving facts, and if it is done wilfully it is a contrivance by which pleas of alibi are made very difficult to disprove and so easy to fabricate. Because this is true, and because of the liability of witnesses to honest mistakes as to times or dates when things occur, and because it is so easy to fabricate a defense of this kind, a defense of that nature is often resorted to and is often attempted to be sustained and made effective by fraud, subornation, and perjury. Because a defense of this nature can, with comparative ease, be made effective by means of fraud, perjury, and falsehood, and the ease with which defenses of this kind can be fabricated, the proof offered to sustain an alibi must be submitted by you to a rigid scrutiny. Now comes the proposition that it is necessary for you to adhere closely to. In considering the strength of evidence necessary to sustain the defense of alibi it is obvious that all the testimony tending to show that the accused was in another place at the time of the killing of the deceased—the missing unknown man—is in direct conflict with that which tends to prove

262 that he was at the place where the crime was committed at the time it was committed and actually assisted in its commission.

You are to look at the facts offered to sustain this alibi, to see whether they cover the time of the killing. If they do not cover the time of the killing, whether they are true or false makes no difference, because the alibi becomes immaterial; it falls to the ground. The purpose that the alibi is to accomplish is to show that it was physically impossible at the time of the doing of the act for the party to have done it because of his presence so far from that act as that it was physically impossible for him to have been there. Unless the alibi shows that state of facts it fails of its purpose, and the strength or weakness of the case must depend upon other evidence in it. The strength of it, as far as the accusing power is concerned, must depend upon the accusatory facts, and the weakness of that

charge against him must be sown by other evidence than the alibi testimony, if it does not cover the time that the act was committed. It is claimed by the defendant that it does cover that time, and if it is made so effectual by the proof, if it is so well established by the evidence that you can depend upon it, and so clearly consistent as covering the time when the act was done, then in the language of that law I have given to you, in regard to the character of this defense, it becomes an effective defense; but all the facts which are offered upon the part of the Government which tend to show the presence of the defendant at the place of the killing, and at the time of the killing, are in direct conflict with the facts offered to show that he was not at that place, if these facts do show that he was there at that time and at that particular place.

263 You are to look at the evidence, the testimony; look to the statements of these witnesses going to the identity of the defendant; their recognition of him; from his appearance, from his face, from his eyes, from his countenance, from his form, and other reasons given by the parties who undertake to identify him. Then you are to look to see whether there are any facts of identification extraneous of the facts growing out of the positive identification of the defendant; whether or not his wife was there present; whether it was the same woman as the one that has been identified as his wife; whether his children were there with him. These are means of identification; that is the figure these facts cut in the case. If these witnesses identify him in such a way as to satisfy you, beyond a reasonable doubt, of the fact, they would put him in a position where they would give him an opportunity by reason of his being with this missing man to have committed this crime.

Now, upon the question of dates, witnesses upon the part of the Government undertake to give a date upon which they saw this defendant with the missing man. You are to see from the whole evidence in the case whether these witnesses may not be mistaken honestly. Then, in looking at dates given upon the other side of the case you are to see, in both instances, if you are to rely upon dates at all, whether these dates are so circumstanced that you can depend upon them in such a way as to say that the witnesses are not honestly mistaken, that they are sustained by other facts, or are free from suspicions, they are free from the reasonable condition that would lead you to believe that they are fabricated,

264 that they are made up for the case. In looking at this matter of dates you are to take into consideration the fact that the dates as entered upon one of the books offered in evidence is not the original entry, but only a copy of it, and you are to see whether the witness offering the evidence as to that date has given a good reason why that original entry was not produced that it might be seen by you. You are to take into consideration all of these facts.

There is a sharp conflict between the evidence looking to the identification of the defendant offered upon the part of the Government at the time claimed by the Government as the time or about the time when the killing occurred, and the evidence offered to show that he was elsewhere. There is a conflict between the proposition that he was at or near the tunnel at one time, and that he was in the Indian country at the same time, or may have been there. The Government witnesses say that he was there. The witnesses who were introduced upon the other side say that they missed

him from up in that section of the country. The evidence given as coming from the Government witnesses as to the declarations of the men as to where they had been, and where they had come from, and where the deceased had found this defendant, shows that he brought him from that section of the country. Now, these are all facts that are to be considered by you. First, if you find a conflict existing you are to reconcile the conflict upon the theory of an honest mistake as to time, or as to dates, if you can, and you can readily and easily do that upon the principle that men can not give with that degree of certainty a particular date so that they may preclude all possibility or all reasonable conclusion that they
265 may not be mistaken as to the precise date. In reconciling this conflict, I say you are to do it upon the theory of an honest mistake as to dates if you can. If you can not do it that way then you are to fasten your faith to that evidence that you find is the most worthy of belief in the light of all the facts and circumstances in the case. If the evidence of identity is of that character as to lead you to believe that it is testimony, first, that is honestly given, and secondly, that it is testimony that establishes the identity of the defendant at this place where he was in company with this missing man, and therefore had an opportunity of taking his life, you have a state of case, of course, that would be entitled to belief, unless the facts are overthrown by testimony that is sufficiently strong to overthrow a case of that kind. If it is sufficiently strong to do that, it leaves the case where the identity would fail, but if it is not the identity must remain.

Now, gentlemen, I think I have given you in a general way these propositions that are involved in the case, and unless there is something further you will retire to further consider the case.

Verdict, guilty of murder.

266 The court among other things charged the jury as follows:

"Now we go to the case where we are to look at the evidence to see whether or not the defendant is the party who committed that crime, and in doing that we are to find if we can from the testimony whether the defendant had an opportunity of committing the offense by reason of his proximity to the missing man; whether he was in company with him, and if so, at what time; whether he was last seen with him, and in that connection if he was last seen with him, whether he has explained his presence with the deceased in such a way as to destroy any presumption that might arise from his connection with him at the time. If you can, either by positive proof or circumstances, such as the possession of articles belonging to the deceased or the fruit of these articles in the shape of other property, if you are able to find that he had a motive for this act it is your duty to find it, but it is not necessary that you should find it to enable you to find either the existence of malice aforethought, or that he was the party who committed that act."

To the giving of which charge the defendant at the time objected, which objection was by the court overruled and the defendant at the time excepted.

"Now the question in this case is to ascertain whether the defendant in this case is the party who took the life of that unknown man, if we have found these other propositions to be true.

"To determine that it is your duty to look at all the facts and
267 circumstances in this case. First you are to look at the case to see whether the defendant had any motive for the killing or not, not that it is necessary to prove the motive, because, in the language of the law I have already substantially given to you, it is frequently so hidden in the mind and the breast of the party who commits the crime that we are unable to drag it to the light of day, but it is your duty to see whether or not there was a motive which produced that result, or what was the motive which prompted the man to act in such a monstrously wicked was as to take human life.

If we were to expect that that motive was adequate to that crime, of course we never could find any such crime, because there is no motive adequate to the crime of willful, wicked murder. There ought not to be any motive that is adequate in the mind of any man from the standpoint of self-interest alone, because when he consults that what is there in this world in proportion to the wickedness of the act, or that can repay him for it after he has committed it. If you please, throw the moral part of it out of consideration altogether. It is not necessary to find the existence of motive. If you do find it, it becomes that much more evidence in the case. If we find an act done by a particular party and under such circumstances as to show that it was done willfully and with premeditation, that there was a formed design to do the act to produce the result, it matters not if there was no motive existing or that can be found. There always is a motive; you can not always find it, however."

To the giving of which charge the defendant at the time excepted.

The court also further charged the jury as follows:

"All of the Government's evidence that is offered in the case that is accusatory, that tends to show his identification, that he was as-
268 sociated with the missing man, that he was seen with him, putting him in a position where he may have had an opportunity to have disposed of him by death, is in contradiction to the testimony that is offered to show that he did not have an opportunity. This alibi, to be effective, in the first place must be established so as to be credible, and when established it must be of that character to show that at the time of the act, whether it was upon the date given by these Government witnesses that they were seen together on some later day, but at the time of the killing, if it did occur, that he had an opportunity of doing that act, the alibi, to be effective, must show that at that time he did have that opportunity. And you will bear in mind in this connection that both of these sets of witnesses may be mistaken as to the particular days given by them. They may not be mistaken as to other facts and their testimony in that regard may be entirely inconsistent; that is to say, that the witnesses who are offered here upon the part of the Government and who swear to the identity of the defendant as the man who was with this missing man or the man claimed to be the missing man upon the part of the Government, and the man they offer to show you is the missing man by means of these extraneous circumstances, circumstances extraneous of the body, such as the boots and the evidence of the teeth, &c., I say the evidence may be reconciled in this way.

"These men may be mistaken honestly as to the particular date offered by them as the time they saw them together. The other men may also be

mistaken as to their dates, and these Government witnesses could be honestly mistaken, and yet have seen them together and the man could have been murdered after they were together. That would be a state of case that would not be in want of harmony with the evidence offered
269 on the other side showing the alibi." To the giving of which charge to the jury the defendant at the time excepted. The court, among other things, charged the jury as follows:

"An alibi, to be effective, to amount to a defense, to put a case in an attitude where a defendant is protected by it, must be of a character to make it physically impossible for him to have been with this man at the time of the killing. That is the point that is at issue—the time when the party was killed, and whether or not this defendant was the party who committed that act. Now, this evidence that is offered as alibi testimony is evidence that is always competent to go to a jury, but it is evidence that is to be viewed with a great deal of scrutiny, for the reason given by the law. If it is credible, if it appears to be a state of case that made it physically impossible for the party to have been with the missing man at the time of the killing, it is effective in the law, and one of the most effective defenses that can be offered; but if it is not credible, either because it is forged willfully or because of an honest mistake, then it ceases to be effective, although the evidence supporting it may be truthful, the facts may be credible. If they are not of a character to make it impossible for the party to have been at that place at that time then it is not valuable; it does not have the effect of showing that he was not the party or may not have been the party."

The defendant at the time excepted to the giving of this charge. The court, among other things, charged the jury as follows:

"The law says that this defense is of all others the most decisive when duly substantiated or established, yet it is the easiest defense to fabricate and the most difficult to be disproved.

270 "An alibi that is not circumstanced as proof amounts to but little. Its value depends upon the way it is circumstanced; that is, the witness or witnesses must be able to give you a detailed statement of such circumstances as to lead you to believe it is true, and that the defendant could not have been at the place of the killing and participated in it. A witness must be able to give you a set of circumstances which may have occurred, which may be true in every respect, and the falsehood may be only in applying them either purposely or by mistake to a different time or date or hour than that in which they occurred, and if this is done by mistake it constitutes a failure of the facts and if it is done willfully it is a contrivance by which pleas of alibi are made very difficult to disprove and easy to fabricate. Because this is true, and because of the liability of witnesses to honest mistakes as to the time or dates when things occur, and because it is so easy to fabricate a defense of this kind, a defense of that nature is often resorted to and is often attempted to be sustained and made effective by fraud, subornation and perjury. Because a defense of this kind can with comparative ease be made effective by means of fraud, perjury, and falsehood, and the ease with which defenses of this kind can be fabricated the proof offered to sustain an alibi must be submitted by you to a rigid scrutiny. In considering the strength of evidence necessary to sustain the defense of alibi it is obvious that all the testimony tending to show

that the accused was in another place at the time of the killing of the unknown man is in direct conflict with that which tends to prove that he was at the place where the crime was committed at the time it was committed and actually assisted in its commission. There is this inconsistency between this evidence, that is, provided these parties are not mistaken in dates, if
271 they are mistaken in dates, either one of them, you can reconcile that inconsistency by putting the party at one place at another time and at the place over here where the killing was done, if you believe the evidence establishes it. It is your duty upon this point specially to look closely to all the facts and circumstances that show his presence at that place at the time that the man was killed, whether it was on the specific date given by these witnesses or at some other date. You are to look at all the facts and circumstances that may be offered as identifying the defendant whether they offer you facts and circumstances outside of their positive identification of him, because that is positive evidence, the fact that they saw, him and that upon the stand they recognize him as the same person they saw, by his appearance, by his countenance, by his eyes, by the general shape of his person, and all these facts, and whether or not there are any other extraneous facts in the shape of the identity of his family, with the family that they saw. These facts that go to corroborate his identity as testified to by these witnesses."

To the giving of which charge by the court the defendant at the time excepted. The court, among other things, charged the jury as follows:

"Then you are to look at the character of these witnesses; whether they are intelligent, whether they are reasonable, whether their testimony seems probable in its own light or in the light of the other identifying witnesses who are offered in the case, or in the light of other extraneous facts that are offered as means of identification. Then in looking at this character of an alibi you are to see what the means of knowledge upon the part of the witnesses offered for that purpose were; whether or not they might not
272 be mistaken as to dates, whether or not there is anything in their statements suspicious, such as the failure to provide original record book, or original entries, facts of that kind. You are to see what the nature of that alibi is; whether it is true or not, and if true even then if it is consistent with the theory that at the time of the killing he was in the Indian country at the place of the killing, and that he therefore took part or committed this crime. Of course the fact of opportunity alone does not make a man guilty of a crime, because men frequently have opportunities of taking life, yet do not do it; but in that connection you are to look at the other facts and circumstances in the case to see whether or not he is the party who did take the life of this unknown man. These facts are to be looked at in this way. It is the rule of the law that if there are inculpatory facts offered against the party and he does not explain away these facts, when, if they were not facts and he could explain them away by the means of other witnesses, and he does not produce that evidence, the law says that it is a foundation for a presumption against him."

To the giving of which charge the defendant at the time excepted. The court also, among other things, charged the jury as follows:

"When a fact that bears upon him personally is brought to his attention and it is such a fact that you think that he may be reasonably expected to

explain and would explain if he was innocent, that is, if it may reasonably be supposed that the explanation was within his power and he fails to produce it, then that is to be taken into consideration as being against him just so far as you think that failure is inconsistent with innocence and indicative of guilt. If it is true in this case that he could have
273 shown by his father-in-law or by his brother-in-law or by any other witnesses, a state of case that would have the effect of destroying the evidence offered as accusatory evidence upon the part of the Government, and he does not avail himself of that means, then you are to take it in the light given you by the law I have just read, so far against him as you think from all the circumstances such a presumption is entitled to in the light of that condition which confronts him."

To the giving of which charge the defendant at the time excepted. The court further charged the jury as follows:

"You are not to draw any inference from the fact that the defendant did not go upon the stand. You may draw inferences from his failure to produce evidence in his power. As I have told you, if he has any evidence that he could avail himself of to show a state of case different from that asserted by the Government and he fails to produce that, you have a right to infer from that that he does not have it; that any facts of that kind do not exist. That is an inference that you have right to make, but you have no right to make any inference against him at all because of his failure to go upon the stand; a man may go upon the stand or not, as he pleases; it is optional with him."

To the giving of this charge the defendant at the time excepted.

After the jury had been out some time they came and requested that they be again charged upon the subject of alibi and the importance to be put in dates both for the defense and prosecution, and the court charged them as follows:

"Now comes the proposition that it is necessary for you to adhere to closely. In considering the strength of evidence necessary to sustain the defense of alibi it is obvious that all the testimony tending to show
274 that the accused was in another place at the time of the killing of the deceased, the missing unknown man, is in direct conflict with that which tends to prove that he was at the place where the crime was committed at the time it was committed and actually assisted in its commission. You are to look to the facts offered to sustain this alibi to see whether they cover the time of the killing. If they do not cover the time of the killing, whether they are true or false makes no difference, because the alibi becomes immaterial; it falls to the ground. The purpose that the alibi is to accomplish is to show that it was physically impossible at the time of the doing of the act for the party to have done it because of his presence so far from that act as that it was physically impossible for him to have been there.

"Unless the alibi shows that state of facts it fails of its purpose, and the strength or weakness of the case must depend upon other evidence in it, the strength of it as far as the accusing power is concerned must depend upon the accusatory facts and the weakness of that charge against him must be shown by other evidence than the alibi testimony if it does not cover the time that the act was committed."

The defendant at the time excepted to the giving of this charge. The court further charged the jury among other things as follows:

"You are to look to the statements of these witnesses going to the identity of the defendant, their recognition of him; from his appearance, from his face, from his eyes, from his countenance, from his form and other reasons given by the parties who undertake to identify him. Then you are to look to see whether there are any facts of identification extraneous of these facts growing out of the positive identification of the defendant; whether or not his wife was there present; whether it
275 was the same woman as the one who has been identified as his wife; whether his children were there with him. These are means of identification; that is the figure these facts cut in the case. If these witnesses identify him in such a way as to satisfy you beyond a reasonable doubt of the fact, they would put him in a position where he would have an opportunity, by reason of his being with this missing man, to have committed this crime."

To the giving of this charge the defendant at the time excepted. The court also among other things charged the jury as follows:

"Now, upon the question of dates, witnesses upon the part of the Government undertake to give a date upon which they saw this defendant with the missing man. You are to see from the whole evidence in the case whether these witnesses may not be mistaken honestly. Then in looking at dates given upon the other side of the case you are to see, in both instances, if you are to rely upon dates at all, whether these dates are so circumstanced that you can depend upon them in such a way as to say that the witnesses are not honestly mistaken, that they are sustained by other facts, or are free from suspicion, they are free from the reasonable condition that would lead you to believe that they are fabricated, that they are made up for the case. In looking at this matter of dates you are to take into consideration the fact that the dates as entered upon one of the books offered in evidence is not the original entry, but only a copy of it, and you are to see whether the witness offering the evidence as to that date has given a good reason why that original entry was not produced that it might be seen by you. You are to take into consideration all of these facts. There is a sharp conflict between the evidence looking
276 to the identification of the defendant offered upon the part of the Government at the time claimed by the Government as the time or about the time when the killing occurred and the evidence offered to show that he was elsewhere. There is a conflict between the proposition that he was at or near the tunnel at one time and that he was in the Indian country at said time, or may have been there. The Government witnesses say that he was there. The witnesses who were introduced upon the other side say that they missed him from up in that section of the country. The evidence given as coming from the Government witnesses as to the declaration of the men as to where they had been and where they had come from and where the deceased had found this defendant, shows that he brought him from that section of the country. Now these are all facts that are to be considered by you. First, of you find a conflict existing you are to reconcile the conflict upon the theory of an honest mistake as to the time, or as to the dates, if you can, and you can readily and easily

do that upon the principle that men can not give with that degree of certainty a particular date so that they may preclude all possibility or all reasonable conclusion that they may not be mistaken as to the precise date."

To the giving of which charge to the jury the defendant at the time excepted.

Some time after the giving of the charge to the jury they returned into court with a verdict of guilty of murder as charged in the within indictment; whereupon the court read said verdict to the jury and asked the foreman if the verdict was their verdict. The foreman responded "Yes, sir." Said jury was then polled and the judge read said verdict to each of the jury, and asked each of the jury if the verdict just read in his hearing was his verdict; all of the jury answered promptly except one juryman, W. P. Brown, who answered, "It may be taken for my verdict."

277 The court then read the verdict again to him and again asked him if the verdict just read in his hearing was his verdict. He then answered, "Yes." Whereupon the court accepted the verdict and discharged the jury.

The defendant then filed his motion for a new trial.

United States circuit court, May term, 1892, western district of Arkansas.

UNITED STATES }
vs.
JOHN GRAVES. }

Now comes the defendant in this case and moves the court to set aside the verdict in this case and grant him a new trial for the following causes, viz:

1st. Because the verdict is contrary to the law.

2nd. Because the verdict is contrary to the evidence.

3rd. Because the court erred in charging the law to the jury.

4th. Because the court erred in permitting the district attorney in his argument to the jury to comment on the absence of defendant's wife.

5th. Because the verdict returned into court was not the verdict of the jury, because when the jury was being polled after having returned into court with the verdict, W. P. Brown, one of the jury, hesitated to answer that the verdict read by the court was his verdict, and reluctantly answered afterwards that the verdict might be taken for his verdict.

And for other good and sufficient reasons.

JOHN GRAVES, *Deft.*,
By MARMON & JACKSON,
FREDERICK & RUTHERFORD,
His Attorneys.

Which motion was by the court overruled, and, in overruling, made the following remarks:

278 In the circuit court of the United States within and for the western district of Arkansas. August term, A. D. 1892.

UNITED STATES
vs. } Murder.
JOHN GRAVES.

Ruling of the court on motion for a new trial; delivered Sept. 13th, 1892, 3:00 o'clock p. m.

PARKER, J.:

In the motion for a new trial in this case the first cause set out is, "because the verdict is contrary to the law," and the second cause as set out is, "because the verdict is contrary to the evidence." I can not agree with the assertion in either one of these causes. I am not prepared to say that the verdict in this case is contrary to either the law or the evidence. It seems to me that the whole case was fairly submitted to the jury. The theory of the Government as to the guilt of the defendant was ably presented, and the evidence offered by the defendant to explain that theory was heard by the jury and commented upon ably by both counsel for Government and defendant. The theory of the absence of the defendant from the place of this killing so as to make it impossible for the defendant to have been at the place of the killing at the time it occurred, was presented to the jury with the evidence supporting it, and the jury
279 passed upon that evidence, and I am not prepared to say that they made any mistake. I think all the essential elements of the case were made out to the extent required by the law, beyond a reasonable doubt.

The third cause is, as set out in the motion for a new trial, "because the court erred in charging the law to the jury." No special error is pointed out in the motion, and I am not able to find anything that, in my judgment, is erroneous. I think the propositions of the law invoked on either side of the case were fully, fairly, and correctly given.

Mr. FREDERICK (of counsel for defendant). I want to say that I hadn't read the court's charge, and whatever error we find there hereafter we can set it out.

The COURT. The fourth cause, as set out in the motion for a new trial, is, "because the court erred in permitting the district attorney in his argument to the jury to comment on the absence of defendant's wife." The question is whether it was proper for the district attorney to comment upon that fact, and even if that state of case exists which would be improper whether it was such error as that a court ought to disturb the verdict for it. It is a principle of the law that if an item of evidence is in the control of a party, and there is such a state of case created by the evidence against him as to make it seemingly necessary that that item should be produced, and he fails to produce it, or conceals it, that that may be taken as the foundation for a presumption against him. Now, it is necessary to say a word in this connection in order that the appellate court may understand this matter.

Out of the usual line of cases of this kind the wife of the defend-
280 ant became an item of evidence in the case. It will be remembere' that one of the great questions in the case was the identity of the defendant as the party who was with the unknown man whom the Government claims he murdered. It can not be denied by persons who heard that case that the evidence of identity was remarkable for its strength, especially the evidence of the wife of the man at whose house the parties stopped. The reasons given by her in detail were as clear and concise and satisfactory as ever I heard in a court of justice on a question of that kind. It was a question of identity. These witnesses testified they saw the unknown man and the defendant, and the woman the defendant passed as his wife, and two children, there in company, and the last they saw of this unknown man he was in the company of these people. Now, if this woman was the wife of the defendant, or whether she was or not, if she was the woman that was there with him, and the witnesses identify her as being the woman, as some of them do, she stands before the jury as an item of evidence in the case going to show the identification of the defendant. The witnesses identified the defendant as the man who was with the murdered man in the Indian country, as I have said, and they stated that the defendant was there with his wife and children. These identifying witnesses stated they would know his wife if they could see her They thought they would know her if they could see her. Some of them stated on the stand they did see her here, and did know her, and that she was the same woman that was there. She was not in the court room at any time during the trial of the case, but defendant's counsel at one time during the trial admitted she was in the hall,
281 outside the court room, and she was actually called at one time at their request, as I remember. As I have said, one of the witnesses, and perhaps more, stated they had seen her out in town, and they recognized her as the woman who was present with the defendant in the Indian country when he was with the unknown man who was alleged by the Government to have been murdered by the defendant. I think it very manifest that during the trial of this case the wife was kept out of the way so the identifying witnesses could not see her and identify her. She became an item of evidence as though she was an inanimate thing. Suppose she had been inanimate, and as such was concealed by the defendant when there was evidence offered tending to show identification, and the production of that item of evidence would serve as a key that would either further strengthen that identification or that would weaken it, and perhaps would destroy it; the fact that she was kept out of the way so the witnesses could not see her is a proper fact for the jury to take into consideration in the case, upon the principle that if a party has a fact within his possession and there are accusatory facts that may be offered that might be explained away by the production of that fact, if it be a fact as claimed by him, and he does not produce it, the law says that it is a foundation for a presumption against him when he makes a failure in that regard; and the fact of the witnesses not being able to see her is a fact that was proper as a subject of comment by the counsel on the part of the Government. Now, it was not necessary that the woman should be produced before the

jury that they might see her. In my judgment it was not important
282 that they should see her. To these witnesses it may have been important that they should have had an opportunity to see her in order that they might be able to state whether or not she was the wife or the woman passing for the wife of the defendant, and was along with him when he was in company with the unknown man. It presents rather a singular state of case where a man's wife, when he is being tried upon a charge of murder, will come to the door of the hall and never come in the court room, never be present during the trial. In this case the wife of the defendant stood as a proving fact in it one way or the other. If these witnesses, after having had a fair chance to look at her, would have sworn she was not the woman that was with the defendant at that time and the defendant would have been able to show that she was his wife, that would have gone far to exonerate him; but if, after looking at her, they identified her before the jury and were able to state she was the wife of the defendant, or the woman passing as his wife at that time, and she was with him, that fact would go far to strengthen the identifying facts in the case. And if it be the foundation for a presumption against a party withholding that fact, it certainly can not be out of order or improper upon the part of the district attorney to comment upon that fact any more than it would be out of order or improper for the counsel on the other side to comment upon the Government withholding a fact within its power to produce. The court in treating of that matter considers this woman as a fact in the case, an item of evidence, and I do not think there was any error committed by the court in permitting the district attorney to comment upon this fact.

283 The fifth cause for a new trial, as set out in the motion, as it stands is a mistake, and it is calculated to give the appellate court a wrong impression of what did occur. It becomes necessary, therefor', in order to get on the record what did occur, to state it as it transpired. The jury came into court, headed by a foreman, and their names were severally called by the clerk, and they all answered present. The court asked the foreman if they had agreed on a verdict, and the foreman answered yes, and passed up to the court the indictment, on the back of which was written the following verdict: "We, the jury, find the defendant, John Graves, guilty of the crime of murder as charged in the within indictment." The following question was then put to the jury in a general way: "Is this your verdict?" and the answer came, "Yes." The court then asked Mr. Marmon, one of defendant's counsel, and the only one present, if he desired the jury polled. He answered that he did, and the clerk then proceeded to call the roll of jurymen, and as each juror was called the following question was put: "Mr. , is the verdict just read in your hearing your verdict?" and the answer "Yes" came from each of them until Mr. Brown's name was called, and the court put the question to him, "Mr. Brown, is the verdict just read in your hearing your verdict?" and he then answered, "It may be taken as my verdict," or, "It may be taken as such." The court then repeated the question, "Mr. Brown, is the verdict just read in yo. hearing your verdict?" and he answered, "Yes." This certainly was a sufficient affirmation of the verdict, if the first could not be so considered; but taking into
284 consideration the manner of Mr. Brown, I think he intended the first answer as an affirmative response, and his answer was owing to

his peculiar way of expressing it, but it was not satisfactory to the court, and therefor' the court put the question the second time. I have stated this much, for the proposition in the 5th cause for a new trial is misleading, and it would certainly mislead the appellate court that could not see the occurrence except as it is expressed on paper. While I have nothing to say about it, I think that cause ought to be eliminated; but, of course, that is a matter for counsel to determine. It certainly does not represent what took place; Mr. Marmon was simply mistaken about it.

Mr. FREDERICK (of counsel for defense). I am willing it should go out as far as I am concerned.

The COURT. I do not think Mr. Marmon understood the latter part of what occurred. He substantially gives as it took place as far as he goes. I do not think there is any ground for a new trial in the fifth cause as set out in the motion for a new trial.

As was remarked by the district attorney when this motion for a new trial was argued, Mr. Marmon, of counsel for defendant, did not take any exception to this proceeding upon the ground that it was improper, and I think the response of this juror, Mr. Brown, was as strongly affirmative in the end as the response of any other juror, and the court could do no less than to take it as the verdict of that juror. It is to be remarked when the verdict was returned by the foreman and the general question was put, as I have stated it was put, and the general answer of "yes" was given, that was an affirmative verdict of the whole jury. That is
285 to say, the court had a right to take it for granted it was the verdict of all the jury under the response given. This other state of case was disclosed by the polling that took place.

I believe that the defendant in this case has had a fair and full trial; that his case was ably presented in his favor by his counsel, and all there was in it or about it was presented to the jury. I do not think the jury made any mistake in finding the verdict.

The motion will be overruled.

286 To which ruling of the court the defendant at the time excepted and tenders this his bill of exceptions, and prays that the same be signed and made a part of the record, which is accordingly done.

I. C. PARKER,
U. S. Dist. Judge, holding Circuit Court.

287 *Assignment of errors.*

In the United States circuit court, western district of Arkansas, May term, 1892.

UNITED STATES
vs. } Murder.
JOHN GRAVES.

The defendant, John Graves, in the above-entitled cause filed this his assignment of errors committed on the trial of said cause, to wit:

1st. It was error to permit the district attorney in his closing argument to the jury, over the objections of the defendant, to comment upon the absence of the defendant's wife from the presence of the court, and to

state among other things to the jury that the defendant's wife ought to have been sitting by the side of her husband during the trial, so that the witnesses for the Government could see her and identify her as the woman who was said to have been with the defendant in the Indian country before the unknown man's remains or bones were found, and other like arguments, statements, and declarations.

2nd. It was error for the court to charge the jury as follows: "Now we go to the case where we are to look at the evidence to see whether or not the defendant is the party who committed that crime, and in doing that we are to find, if we can, from the testimony whether the defendant had an opportunity of committing the offense by reason of his proximity to the missing man, whether he was in company with him, and, if so,
288 at what time; whether he was last seen with him; whether he has explained his presence with the deceased in such a way as to throw off any presumption that might arise from his connection with him at that time. If you can by positive proof, such as the possession of articles belonging to the deceased, or the fruit of these articles in the shape of other property, if you are able to find that he had a motive for this act, it is your duty to find it, but it is not necessary that you should find it to enable you to find either the existence of malice aforethought or that he was the party who committed that act."

3rd. It was error to charge the jury as follows:

"Now, the question in this case is to ascertain whether the defendant in this case is the party who took the life of that unknown man, if we have found these other propositions to be true. To determine it is your duty to look at all the facts and circumstances in this case. First, you are to look at the case to see whether the defendant had any motive for the killing or not, not that it is necessary to prove the motive, because in the language of the law I have already substantially given to you it is frequently so hidden in the mind and the breast of the party who commits the crime that we are unable to drag it to the light of day, but it is your duty to see whether or not there was a motive which produced that result, or what was the motive which prompted the man to act in such a monstrously wicked way as to take human life. If we were to expect that that motive was adequate to that crime, of course we never could find any such crime, because there is no motive adequate to the crime of wilful, wicked murder. There ought not to be any motive that is adequate in the mind of any man from the standpoint of self-interest alone, because when he consults
289 that what is there in this world in proportion to the wickedness of the act or that can repay him for it after he has committed it?

"If you please, throw the moral part out of consideration altogether. It is not necessary to find the existence of motive. If you do find it, it simply becomes that much more evidence in the case. If we find an act done by a particular party and under such circumstances as to show that it was done wilfully and with premeditation, that there was a former design to do the act to produce the result, it matters if there was no motive existing or that can be found. There always is a motive; you can not always find it, however."

4th. It was error to charge the jury as follows:

"All of the Government's evidence that is offered in the case that is accusatory, that tends to show his identification, that he was associated

with the missing man, that he was seen with him, putting him in a position where he may have had an opportunity to have disposed of him by death, is in contradiction to this testimony that is offered to that he did not have an opportunity. This alibi, to be effective in the first place, must be established so as to be credible, and when established it must be of that character to show that at the time of the act, whether it was upon the date given by these Government witnesses that they were seen together on some later day, but that at the time of the killing, if it did occur, that he had an opportunity of doing that act, the alibi, to be effective, must show that at that time he did not have that opportunity. And you will bear in mind in this connection that both of these sets of witnesses may be mistaken as to the particular days given by them. They may not be mistaken as to the other facts, and their testimony in that regard may be entirely
290 inconsistent; that is to say, that the witnesses who are offered here upon the part of the Government, and who swear to the identity of the defendant as the man who was with the missing man, or the man claimed to be the missing man, upon the part of the Government, and the man they offer to show you as the missing man by means of these extraneous circumstances—circumstances extraneous of the body, such as the boots, and the evidence of the teeth, &c.—I say the evidence may be reconciled in this way. These men may be mistaken honestly as to the particular date offered by them as the time they saw them together. The other men may also be mistaken as to their dates, and these Government witnesses could be honestly mistaken, and yet have seen them together, and the man could have been murdered after they were together. That would be a state of case that would not be in want of harmony with the evidence offered on the other side showing the alibi."

5th. It was error to charge the jury as follows:

"An alibi, to be effective, to amount to a defense, to put a case in an attitude where a defendant is protected by it, must be of a character to make it physically impossible for him to have been with this man at the time of the killing. That is the point that is at issue, the time when the party was killed, and whether or not this defendant was the party who committed that act.

"Now, this evidence that is offered as alibi testimony is evidence that is always competent to go to a jury, but it is evidence that is to be viewed with a great deal of scrutiny, for the reason given by the law. If it is credible, if it appears to be a state of case that made it physically impossible for that party to have been with the missing man at the time of the killing, it is effective in the law, and one of the most effective defenses that can be offered; but if it is not credible, either because it is forged
291 wilfully or because of an honest mistake, then it ceases to be effective, although the evidence supporting it may be truthful, the facts may be credible. If they are not of a character to make it impossible for the party to have been at that place at that time, then it is not valuable; it does not have the effect of showing that he was not the party or may not have been the party."

6th. It was error for the court to charge the jury as follows:

"The law says that this defense is of all others the most decisive when duly substantiated or established, yet it is the easiest defense to fabricate and the most difficult to be disproved. An alibi that is not circumstanced

as proof amounts to but little; its value depends upon the way it is circumstanced; that is, the witness or witnesses must be able to give you a detailed statement of such circumstances to lead you to believe it is true and that the defendant could not have been at the place of the killing at the time of the killing and participated in it. A witness must be able to give a set of circumstances which may have occurred, which may be true in every respect and the falsehood may be only in applying them either purposely or by mistake to a different time or date or hour than that in which they occurred, and if this is done by mistake it constitutes a failure of the facts as proving facts, and if it is done wilfully it is a contrivance by which pleas of alibi are made very difficult to disprove and so easy to fabricate; because this is true, and because of the liability of witnesses to honestly mistake as to the time or date when things occur, and because it is so easy to fabricate a defense of this kind, a defense of that nature is often resorted to and is often attempted to sustained and made
292 effective by fraud, subornation, and perjury. Because a defense of this kind can with comparative ease be made effective by means of fraud, perjury, and falsehood, and the ease with which defense of this kind can be fabricated, the proof offered to sustain an alibi must be submitted by you to a rigid scrutiny in considering the strenght of evidence necessary to sustain the defense of alibi; it is obvious that all the testimony tending to show that the accused was in another place at the time of the killing of the unknown man is in direct conflict with the evidence with that which tends to prove that he was at the place where the crime was committed at the time it was committed and actually assisted in its commission. There is this inconsistency between the evidence, that is, provided these parties are not mistaken in dates; if they are mistaken in dates, either one of them, then you can reconcile that inconsistency by putting the party at one place at another time and at the place over here where the killing was done; if you believe the evidence establishes, it is your duty upon this point especially to look closer to all the facts and circumstances that may be offered as identifying the defendant whether they offer you facts and circumstances outside of their positive identification of him because that is.

"Then facts are to be looked at in this way; it is the rule of the law that if there are inculpatory facts offered against the party and he does not explain away those facts when, if they were not facts and he could explain them away by the means of other witnesses and he does not produce that evidence, the law says that it is a foundation for a presumption against him."

8th. It was error for the court to charge the jury as follows:

"When a fact bears upon him personally—is brought to his attention and it is such a fact that you think that he may reasonably be ex-
293 pected to explain and would explain if he was innocent, that is, if it may be reasonably supposed that the explanation was within his power and he failed to produce it, then that is to be taken into consideration as being against him, then, so far as you think that failure is inconsistent with innocence and indicative of guilt; if it is true in this case that he could have shown by his father-in-law or brother-in-law or by any other witness, a state of case that would have the effect of destroying the evidence offered or accusatory evidence upon the part of the Government and he does not avail himself of that means then you are to take it in the

light given you by the law I have just read against him, as you think from all the circumstances such a presumption is entitled to in the light of that condition which confronts him."

9th. It was error for the court to charge the jury as follows:

"You are not to draw any inference from the fact that the defendant did not go upon the stand. You may draw inferences from his failure to produce evidence in his power, as I have told you; if he has any evidence that he could avail himself of to show a state of case different from that asserted by the Government and he fails to produce that positive evidence; the fact that they saw him and that upon the stand they recognized him as the person by his appearance, by his countenance, and by his face, by his eyes, by the general shape of his person and these facts, and whether or not there are any other extraneous facts in the shape of the identity of his family with the family that they saw; those facts that go to corroborate his identity, as testified to by three witnesses."

7th. It was error for the court to charge the jury as follows:

"Then you are to look at the character of these witnesses; whether
294 they are intelligent; whether they are reasonable; whether their testimony seems probable in its own light or in the light of the other identifying witnesses who were offered in the case, or in the light of other extraneous facts that are offered as means of identification. Then, in looking at this character of an alibi, you are to see what the means of knowledge upon the part of the witnesses offered for that purpose were; whether or not they might not be mistaken as to dates; whether or not there is anything in their statements suspicious, such as the failure to produce an original book or original entries. Facts of that kind you are to see; what the nature of that alibi is; whether it is true or not, and if true, then, if it is consistent or not, with the theory that at the time of the killing he was in the Indian country, at the place of the killing, and that he therefore took part or committed this crime. Of course, the fact of opportunity alone does not make a man guilty of a crime, because men frequently have opportunity of taking life, yet do not do it; but in that connection you are to look at the other facts and circumstances in the case to see whether or not he is the party who did take the life of this unknown man. You have a right to infer from that that he does not have it. That any facts of that kind do not exist, that is an inference that you have a right to make; but you have no right to make any inference against him at all because of his failure to go on the stand. A man may go upon the stand or not, as he pleases. It is optional with him."

10th. It was error for the court to charge the jury as follows:

"Now comes the proposition that it is necessary for you to adhere to closely in considering the strength of evidence necessary to sustain the defense of an alibi. It is obvious that all the testimony tending to
295 show that the accused was in another place at the time of the killing of the deceased, the missing unknown man, is in direct conflict with that which tends to prove that he was at the place where the crime was committed at the time the crime was committed, and actually assisted in its commission. You are to look at the facts offered to sustain this alibi to see whether they cover the time of the killing. If they do not cover the time of the killing, whether they are true or false, makes no difference, because the alibi becomes immaterial—it falls to the ground.

The purpose that the alibi is to accomplish is to show that it was plausibly impossible at the time of the doing of the act for the party to have done, it because of his presence so far from that act as that it was plausibly impossible for him to have been there. Unless the alibi shows that state of facts, it fails of its purpose, and the strength or weakness of the case must depend upon other evidence in it; the strength of it, as far as the accusing power is concerned, must depend upon the accusatory facts, and the weakness of that charge against him must be shown by other evidence than the alibi testimony if it does not cover the time that the act was committed."

11th. It was error for the court to charge the jury as follows:

"You are to look at the evidence, the testimony of these witnesses going to the identity of the defendant; this recognition of him from his appearance, from his face, from his eyes, from his countenance, from his form, and other reasons given by the parties who undertake to identify him. Then you are to look to see whether there are any facts of identification extraneous of these facts growing out of the position, identification of the defendant; whether or not his wife was there present;
296 whether it was the same woman or the one that has been identified as his wife; whether his children were there with him. These are means of identification; that is the figure these facts cut in the case. If these witnesses identify him in such a way as to satisfy you beyond a reasonable doubt of the fact, this would put him in a position where they would give him an opportunity by reason of his being with this missing man to have committed the crime."

12th. It was error for the court to charge the jury as follows:

"Now, upon the question of dates witnesses upon part of the Government undertake to give a date upon which they saw this defendant with the missing man. You are to see from the whole evidence in the case, whether these witnesses may not be mistaken honestly; then in looking at the dates given upon the other side of the case; you are to see whether you are to rely upon dates at all; whether these dates are so circumstanced that you can depend upon them in such a way as to say the witnesses are not honestly mistaken if they are sustained by other facts, or are free from suspicion, they are free from all reasonable conditions that would lead you to believe they are fabricated; that they are mad for the case. In looking at the matter of dates you are to take into consideration the fact that the dates that are entered upon one of the books offered in evidence, is not the original entry, but only a copy of it, and you are to see whether the witnesses offering the evidence as to that date have given a good reason why that original entry was not produced that it might be seen by you. You are to take into consideration all of these facts; there is a sharp conflict between the evidence looking to the identification of the defendant, offered upon the part of the Government, at the time claimed by the Gov-
297 ernment as the time or about the time when the killing occurred, and the evidence offered to show that he was elsewhere. There is a conflict between the proposition that he was at or near the tunnel at one time and date he was in the Indian country at said time, or may have been there. The Government witnesses say that he was there. The witnesses who were introduced upon the other side say that they misses him from up in that part of the country. The evidence given or coming from the

Government witnesses, as the declaration of the men as to where they had been, and where they had come from, and where the deceased had found the defendant, shows that he had brought him from that section of the country. Now, these are all facts that are to be considered by you. *First.* If you find a conflict existing you are to reconcile the conflict upon the theory of an honest mistake as to time or as to the dates, if you can, and you can readily and easily do that upon the principle that men can not give with that degree of certainty, a particular date so that they may preclude all possibility or all reasonable conclusion that they may not be mistaken as to the precise date."

13th. It was error for the court to accept the verdict of the jury. The jury, after a short deliberation, returned into court with a verdict of guilty as charged in the indictment. Whereupon the court read the verdict to each juror and asked them if this was their verdict. All of them answered in the affirmative, except W. P. Brown answered, "It may be taken for my verdict." Whereupon the court again read the verdict to him, and this time, in reply to the same question from the court he answered, "Yes."

14th. It was error for the court to overrule the motion for new
298 trial.

15th. It was error for the court to sentence the defendant.

299 In the United States circuit court of the western district of Arkansas.

UNITED STATES }
vs. } Murder.
JOHN GRAVES. }

I, John Graves, the defendant in the above-stated cause, do solemnly swear that I am not possessed of sufficient means, and am not worth $10.00 above my wearing apparel, and am unable to procure the same so as to prosecute the appeal taken in said cause in the Supreme Court of the United States.

I therefore pray that it be prosecuted in forma pauperis.

J. H. GRAVES.

Sworn to and subscribed before me the 27th day of September, 1892.

STEPHEN WHEELER, *Clerk.*
By W. B. PAPE, *D. C.*

300 *Petition for writ of error.*

In the circuit court of the United States for the western district of Arkansas.

UNITED STATES }
vs. } Murder.
JOHN GRAVES. }

To the clerk of the circuit court of the United States for the western district of Arkansas:

Your petitioner respectfully represents that at the May term, A. D. 1892, of this said court, he was convicted on an indictment charging him with

the crime of murder, and that the said court pronounced judgment and sentence of death upon this petitioner on the verdict of the jury convicting him as aforesaid.

Your petitioner alleges that in the record and proceedings in the trial of said cause there is great and manifest error to the prejudice and great damage of your petitioner. He therefore prays that a writ of error from the Supreme Court of the United States be issued by you under the seal of said circuit court in said cause removing said cause and the record therein to the said Supreme Court, in order that the same may be there examined and if error be found that the judgment and sentence against him there may be reversed.

JOHN GRAVES,
By FREDERICK & RUTHERFORD,
His Attorneys.

Filed Sept. 27, 1892.

301 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the western district of Arkansas, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between The United States of America and John Graves, a manifest error hath happened to the great damage of the said John Graves, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within 60 days from the date hereof, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 7th day of October, in the year of our Lord one thousand eight hundred and ninety-two.

STEPHEN WHEELER,
Clerk of the Circuit Court of the United States for the Western Dist. of Arkansas.

Allowed by

Justice of the Supreme Court of the United States.

302 UNITED STATES OF AMERICA, *ss:*

To William H. H. Clayton, esq., United States attorney for the western district of Arkansas, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 60 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the circuit

court of the United States for the western district of Arkansas, wherein John Graves is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Isaac C. Parker, judge of the district court of the United States, this 7th day of October, in the year of our Lord one thousand eight hundred and ninety-two.

ISAAC C. PARKER,
U. S. Dis. Judge, Holding the Circuit Court.

On this day of , in the year of our Lord one thousand eight hundred and ninety- , personally appeared before me, the subscriber, and makes oath that he delivered a true copy of the within citation to . Sworn to and subscribed the day of , A. D. 189 .

I, William H. H. Clayton, U. S. district attorney for the western dist. of Arkansas, do hereby accept service of the within citation this 7th day of Oct. 1892.

303 UNITED STATES OF AMERICA,
Western District of Arkansas:

I, Stephen Wheeler, clerk of the United States circuit court for the western district of Arkansas, do hereby certify that the foregoing is a true and correct transcript of the record of this court in the case of United States vs. John Graves, convicted of murder at the August term, 1892, as the same appears of record and on file in this office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Fort Smith, in said district, this 10th day of Oct., A. D. 1892.

[SEAL.] STEPHEN WHEELER, *Clerk*,
By I. M. DODGE, *D. C.*

(Indorsement on cover:) Case No. 15173. No. 1203. John Graves, plaintiff in error, vs. The United States. W. Arkansas C. C. U. S. Filed October 17, 1892.

Office Supreme Court U. S.
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JAMES H. McKENNEY,
CLERK

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IN THE

Supreme Court of the United States.

JOHN GRAVES, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

No. 1203.

In Error to the Circuit Court of the United States for the Western District of Arkansas.

A. H. GARLAND,
Attorney for Plaintiff in Error.

IN THE

Supreme Court of the United States.

JOHN GRAVES, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

No. 1208.

In Error to the Circuit Court of the United States for the Western District of Arkansas.

ABSTRACT.

The plaintiff in error was indicted on the 10th day of February, 1892, in the United States Circuit Court for the Western District of Arkansas for the murder of an unknown man in the Cherokee Nation, Indian Territory. The indictment alleges that the killing was done on the 13th day of February, 1889 (Record page 1)

The evidence, on the part of the government, briefly stated, is about as follows :

On the 7th day of February, 1889, two men, a woman and two children, came to George Waters' place in the Cherokee Nation. These people were traveling in an old hack drawn by two horses. The men got a contract to make rails for Waters, and lived in a house about one mile from Waters' residence. These people remained there for several days and left. No one knew any of these people's names (Record pages 24 to 38 of George Waters' evidence).

On Christmas day, 1891, defendant, his wife and two children, came to George Waters' place with an ox team. The witnesses think he is the same man who was there in February, 1889. They claim that they recognized him as the same man by his general appearance, etc. (Record pages 28 to 38).

One witness, James Barnes, stated that he saw, about the 13th of February, 1889, two men, a woman and child, in camp near where the dead man was found. That they had a hack and two horses, and that on the next morning he saw one of the men driving the horses to the hack. That the woman and child were in the hack ; but that he saw but one man and one child (Record pages 45 to 57).

About the 1st of May, 1889, Robert Williams found the remains of a dead man near the place where the witness, Barnes, claims to have seen the people camped on the 13th of February, 1889. The body had been eaten by hogs and was decayed. There were some pieces of clothing found, a pair of boots, etc. Witness could not say whether the dead man was a white man or an Indian (Record page 22).

Some of the witnesses claimed to identify the remains found as those of one of the men who had made rails for George Waters in February, 1889. They claim that the boots found were like those worn by the men who had left Waters' two or three months before. No witness undertook to say who the people were, or where they came from, or whither they went.

The defendant was arrested in January before his indictment in February following.

The defense was an *alibi*. He showed by several witnesses, that in the months of January, February and March of the year 1889, that he was in Washington County, Ark., a distance of 100 miles or more from the place where the remains of the dead man were found (Record pages 93, 103, 107, 113 and 117).

There are fifteen assignments of errors, viz.:

"*First*. It was error to permit the district attorney, in his closing argument to the jury, over the objections of the defendant, to comment upon the absence of defendant's wife from the presence of the court and state, among other things to the jury, that the defendant's wife ought have been sitting by the side of her husband during the trial, so that the witnesses for the government could see her and identify her as the woman who was said to have been with the defendant in the Indian country before the unknown man's remains or bones were found, and other like arguments, statements and declarations" (Record pages 130 and 170).

Second. It was error for the court to charge the jury as follows:

"Now we go to the case where we are to look at the evi-

dence to see whether or not the defendant is the party who committed that crime, and in doing that, we are to find, if we can, from the testimony, whether the defendant had an opportunity of committing the offense by reason of his proximity to the missing man, whether he was in company with him, and, if so, at what time; whether he was last seen with him, whether he has explained his presence with the deceased in such a way as to throw off any *presumption* that might arise from his connection with him at that time. If you can by positive proof, such as the possession of articles belonging to the deceased, or the fruit of these articles in the shape of other property, if you are able to find that he had a motive for this act, it is your duty to find it, but it is not necessary that you should find it to enable you to find either the existence of malice aforethought, or that he was the party who committed that act" (Record pages 160 and 171).

The Third assignment of error is as follows:

"Now the queston in this case is to ascertain whether the defendant in this case is the party who took the life of that unknown man, if we have found these other propositions to be true. To determine it, it is your duty to look at all the facts and circumstances in this case. First, you are to look at the case to see whether the defendant had any motive for the killing, or not, not that it is necessary to prove the motive, because, in the language of the law, I have already substantially given to you, it is frequently so hidden in the mind and breast of the party who commits the crime, that we are unable to drag it to the light of day, but it is your duty to see whether or not there

was a motive which prompted the man to act in such a monstrously wicked way as to take human life. If we were to expect that that motive was adequate to that crime, of course we never could find any such crime, because there is no motive adequate to the crime of wilful, wicked murder. There ought not to be any motive that is adequate in the mind of any man from the standpoint of self interest alone, because, when he consults that, what is there in this world in proportion to the wickedness of the act, or that can repay him for it after he has committed it? If you please, throw the moral part out of consideration altogether. It is not necessary to find the existence of motive. If you do not find it, it simply becomes that much more evidence in the case. If we find an act done by a particular party and under such circumstances as to show that it was done wifully and with premeditation, that there was a former design to do the act to produce the result, it matters not if there was no motive existing or that can be found. There always is a motive; you cannot always find it, however" (Record pages 160 and 171).

The Fourth assignment of error is as follows:

"All of the government's evidence that is offered in the case that is accusatory, that tends to show his identification that he was associated with the missing man, that he was seen with him, putting him in a position where he may have had an opportunity to have disposed of him by death, is in contradiction to this testimony that is offered to show that he did not have an opportunity. This *alibi*, to be effective in the first

place, must be established so as to be credible, and when established it must be of that character to show that at the time of the act, whether it was before the date given by these government witnesses that they were seen together on some later day, but that at the time of the killing, if it did occur, that he had an opportunity of doing the act; the *alibi*, to be effective, must show that at that time he did not have that opportunity. And you will bear in mind in this connection that both of these sets of witnesses may be mistaken as to the particular days given by them. They may not be mistaken as to the other facts, and their testimony in that regard may be entirely inconsistent; that is to say, that the witnesses who are offered here upon the part of the government, and who swear to the identity of the defendant as the man who was with the missing man, or the man claimed to be the missing man, upon the part of the government, and the man they offer to show you as the missing man by means of these extraneous circumstances—circumstances extraneous of the body, such as the boots, teeth, etc. I say the evidence may be reconciled in this way: These men may be mistaken honestly as to the particular date offered by them as to the time they saw them together. The other men may also be mistaken as to their dates, and these government witnesses could be honestly mistaken and yet have seen them together, and the man could have been murdered after they were together. That would be a state of case that would not be in want of harmony with the evidence offered on the other side showing the *alibi*" (Record pages 162 to 171).

The Fifth assignment of error is as follows:

"An *alibi*, to be effective, to amount to a defense, to put a case in an attitude when a defendant is protected by it, must be of a character to make it physically impossible for him to have been with this man at the time of the killing. That is the point that is at issue—the time when the party was killed, and whether or not this defendant was the party who committed that act. Now, this evidence that is offered as *alibi* testimony is evidence that is always competent to go to a jury, *but it is evidence that is to be viewed with a great deal of scrutiny* for the reason given by the law. If it is credible, if it appears to be a state of case that made it physically impossible for that party to have been with the missing man at the time of the killing, it is effective in the law, and one of the most effective defenses that can be offered; but if it is not credible, either because it is forged wilfully or because of an honest mistake, then it ceases to be effective, although the evidence supporting it may be truthful, the facts may be credible. If they are not of a character to make it impossible for the party to have been at that place at that time, then it is not valuable; it does not have the effect of showing that he was not the party or may not have been the party" (Record pages 162 to 172).

The Sixth assignment of error is as follows:

"The law says that this defense is of all others the most decisive when duly substantiated or established, yet it is the easiest defense to frabricate and the most difficult to be disproved. An *alibi* that is not circumstanced, as proof amounts to but little, its value depends upon the way it is circumstanced;

that is, witness or witnesses must be able to give you a detailed statement of such circumstances to lead you to believe it is true, and that the defendant could not have been at the place of the killing, at the time of the killing, and participated in it. A witness must be able to give a set of circumstances which may have occurred, which may be true in every respect, and the falsehood may be only in applying them, either purposely or by mistake to a different time or date, or have them that in which they occurred; and, if this is done by mistake, it constitutes a failure of the facts as proving facts; and, if it is done wilfully, it is a contrivance by which pleas of *alibi* are made very difficult to disprove and so easy to fabricate; because this is true, and because of the liability of witnesses to honestly mistake as to the time or date when things occur, and because it is so easy to fabricate, a defense of this kind, a defense of that nature, is often resorted to and is often attempted to be sustained and made effective by fraud and subordination and perjury. Because a defense of this kind can, with comparative ease, be made effective by means of fraud, perjury and falsehood, and the ease with which a defense of this kind can be fabricated, the proof offered to question an *alibi* must be submitted by you to a *rigid scrutiny* in considering the strength of evidence necessary to sustain the defense of *alibi*, it is obvious that all the testimony tending to show that the accused was in another place at the time of the killing of the unknown man, is in direct conflict with the evidence with that which tends to prove that he was at the place where the crime was committed, at the time the crime was committed, and actually assisted in

its commission. There is this inconsistency between the evidence, that is, provided these parties are not mistaken in dates; if they are mistaken in dates, either one of them, then you can reconcile that inconsistency by putting the party at one place at another time and at the place over here where the killing was done; if you believe the evidence establishes it, it is your duty, upon this point especially, to look closer to all the facts and circumstances that may be offered as identifying the defendant, whether they offer you facts and circumstances outside of their position, indentification of him, because that is positive evidence, the fact that they saw him, and that upon the stand they recognized him as the same person they saw, by his countenance, by his eyes, by the general shape of his person, and all the facts in the shape of the indentity of his family, with the family that they saw. These facts that go to corroborate his identity as testified to by these witnesses" (Record pages 162 and 172).

The Seventh assignment of error is as follows:

"Then you are to look at the *character of these witnesses*; whether they are intelligent; whether they are reasonable; whether their testimony seems probable in its own light or in the light of the other identifying witnesses who were offered in the case, or in the light of other extraneous facts that are offered as means of identification. Then, in looking at this character of an *alibi*, you are to see what means of knowledge upon the part of the witnesses offered for that purpose were; whether or not they might not be mistaken as to dates; whether or not there is anything in their statements suspicious, such as the

failure to produce an original book or original entries, facts of that kind. You are to see what the nature of that *alibi* is; whether it is true or not, and, if true, whether if it is consistent with the theory that at the time of the killing he was in the Indian country at the place of the killing and that he therefore took part and committed this crime. Of course the fact of opportunity alone does not make a man guilty of a crime, because men frequently have opportunity of taking life, yet do not do it; yet, in that connection, you are to look at the other facts and circumstances in the case to see whether or not he is the party who did take the life of this unknown man. These facts are to be looked at in this way: It is the rule of the law that if there are inculpatory facts offered against the party, and he does not explain away these facts, when if they were not facts, and he could explain them away by means of other witnesses, and he does not produce that evidence, the law says that it is a foundation for a presumption against him" (Record pages 163 and 172).

The Eighth assignment of error is as follows:

"When a fact bears upon him personally, is brought to his attention, and it is such a fact that you think he may be reasonably expected to explain if he was innocent, that is, if it may reasonably be supposed that the explanation was within his power, and he fails to produce it, then that is to be taken into consideration as being against him just so far as you think that failure is inconsistent with innocence and indicative of guilt. If it is true in this case that he could have shown by

his father-in-law, or his brother-in-law, or by any other witnesses, a state of case that would have the effect of destroying this evidence offered as accusatory evidence upon the part of the government, and he does not avail himself of that means, then you are to take it in the light given by the law I have just read, so far against him as you think from all the circumstances such a presumption is entitled to in the light of that condition which confronts him" (Record pages 163 and 173).

The Ninth assignment of error is as follows:

"You are not to draw any inference from the fact that the defendant did not go upon the stand; you may draw inferences from his failure to produce evidence in his power. As I have told you, if he has any evidence to avail himself of, to show a state of case different from that asserted by the government, and he fails to produce that, you have a right to infer from that that he does not have it, that any facts of that kind do not exist, that is an inference that you have a right to make, but you have no right to make any inference against him at all because of his failure to go upon the stand; a man may go upon the stand or not, as he pleases; it is optional with him" (Record page 164).

The Tenth assignment is as follows:

"Now comes the proposition that it is necessary for you to adhere to closely. In considering the strength of evidence necessary to sustain the defense of an *alibi*, it is obvious that all the testimony tending to show that the accused was in another place at the time of the killing of the deceased, the missing unknown man, is in direct conflict with that which

tends to prove that he was at the place where the crime was committed and actually assisted in its commission. You are to look to the facts offered to sustain this *alibi* to see whether they cover the time of the killing. If they do not cover the time of the killing, whether they are true or false, makes no difference, because the *alibi* becomes immaterial; it falls to the ground. The purpose that the *alibi* is to accomplish is to show that it was physically impossible at the time of the doing of the act for the party to have done it, because of his presence so far from that act as that it was physically impossible for him to have been there. Unless the *alibi* shows that state of facts it fails of its purpose, and the strength or weakness of the case must depend upon other evidence in it, the strength of it as far as the accusing power is concerned must depend upon the accusatory facts, and the weakness of that charge against him must be shown by other evidence than the *alibi* testimony if it does not cover the time that the act was committed" (Record pages 164 and 174).

The Eleventh assignment of error is as follows:

"You are to look to the statements of these witnesses going to the identity of the defendant, their recognition of him; from his appearance from his face, from his eyes, from his countenance, from his form, and other reasons given by the parties who undertake to identify him. Then you are to look to see whether there are any facts of identification extraneous of these facts growing out of positive identification of the defendant; whether or not his wife was then present; whether it was the same woman as the one who had been identified as his

wife; whether his children were there with him. These are means of identification; that is the figure these facts cut in the case. If these witnesses identify him in such a way as to satisfy you beyond a reasonable doubt of the fact, they would put him in a position where he would have an opportunity, by reason of his being with this missing man, to have committed this crime" (Record pages 165 and 175).

The Twelfth assignment of error is as follows:

"Now upon the question of dates, witnesses upon the part of the government undertakes to give a date upon which they saw this defendant with the missing man. You are to see from the whole evidence in the case whether these witnesses may not be mistaken honestly. Then in looking at dates given upon the other side of the case you are to see, in both instances, if you are to rely upon them at all, whether these dates are so circumstanced that you can depend upon them in such a way as to see that the witnesses are not honestly mistaken, that they are sustained by other facts, or are free from suspicion, they are free from the reasonable condition that would leave you to believe that they are fabricated, that they are made up for the case. In looking at this matter of dates, you are to take into consideration the fact that the dates entered upon one of the books offered in evidence is not the original entry, but only a copy of it, and you are to see whether the witness offering the evidence as to that date has given a good reason why that original entry was not produced, that it might be seen by you; you are to take into consideration all of these facts. There is a sharp conflict

between the evidence looking to the identification of the defendant offered upon the part of the government at the time claimed by the government as the time, or about the time when the killing occurred and the evidence offered to show that he was elsewhere. There is a conflict between the proposition that he was at or near the tunnel at one time and that he was in the Indian country at said time, or may have been there. The government witnesses say that he was there. The witnesses who were introduced upon the other side say that they missed him from up in that section of the country. The evidence given as coming from the government's witnesses as to the declaration of the men as to where they had been and where they had come from, and the deceased had found this defendant, shows that he brought him from that section of the country. Now these are all facts that are to be considered by you. First, if you find a conflict existing, you are to reconcile the conflict upon the theory of an honest mistake as to the time, or as to the dates if you can, and you can readily and easily do that upon the theory of an honest mistake as to the time, or as to the dates, if you can, and you can readily and easily do that upon the principle that men cannot give, with that degree of certainty, a particular date so that they may preclude all possibility, or all reasonable conclusion, that they may not be mistaken as to the precise date" (Record pages 165 and 175).

The Thirteenth assignment is as follows:

"Some time after the giving of the charge to the jury they returned into court with a verdict of guilty of murder as charged in the within indictment; whereupon the court read said ver-

dict to the jury and asked the foreman if the verdict was their verdict. The foreman responded: 'Yes, sir.' Said jury was then polled, and the judge read said indictment to each of the jury, and asked each of the jury if the verdict just read in his hearing was his verdict; all of the jury answered promptly except one juryman, W. P. Brown, who answered: 'It may be taken for my verdict.' The court then read the verdict again to him, and again asked him if the verdict just read in his hearing was his verdict. He then answered: 'Yes.' Whereupon the court accepted the verdict and discharged the jury" (Record page 166).

ARGUMENT.

The district attorney ought not to have been allowed to comment to the jury upon the absence of the defendant's wife from the court-room during the trial. She was not a witness in the case and could not have been under the law. She was not a competent witness either for or against her husband. This the jury did not know. The jury understood, no doubt, from the argument of the district attorney that she was purposely kept from testifying for her husband because her evidence might have been damaging to him. The court failed to tell the jury that they should indulge no presumption or inference against the defendant on account of defendant's wife not testifying in the case, that she could not have been a witness; and the court ought to have sustained the defendant's objection to the district attorney's argument to the jury in this particular, and guarded them against falling into an error as to any presumption against the defendant.

As a general rule counsel, in argument, must confine themselves to the facts brought out in evidence. But when counsel grossly abuses his privilege, to the manifest prejudice of the opposite party, it is the duty of the judge to stop him; and if he fails to do so, and the impropriety is gross, it is good ground for a new trial.

When counsel are permitted to state facts not in evidence, and to comment upon them, the usage of courts regulating trials is departed from, the laws relating to evidence are violated, and the full benefit of trial by jury is denied.

4 *Am. and Eng. Ency. Law*, 875 *and* 876.
State vs. Degonia, 69 *Mo.*, 485.
Brown vs. Swineford, 44 *Wis.*, 282.
Ferguson vs. State, 49 *Ind.*, 33.
Tucker vs. Henniker, 41 *N. H.*, 317.

See Wilson vs U.S. 149 U.S. 60

The second and third assignments of error consist in the error of the court in charging the jury that it was "not necessary" to find motive.

Church, C. J., in *People vs. Bennett*, 49 *N. Y.*, 137, among other things, says: "With motives, in any speculative sense, neither the law nor the tribunal which administers it has any concern. It is in cases of proof by circumstantial evidence that motive often becomes not only material but controlling, and in such cases the fact from which it may be inferred must be proved. It cannot be imagined any more than any other circumstance in the case."

This was a case of proof wholly by circumstantial evidence. There was no proof that any man had been killed at all. The remains of a dead man were found, but there is no proof that he had been killed. There is no proof of how he came to die. We challenge the record to show it.

The fifth assignment of error is as to the court's charge to the jury on the question of the identification of the defendant with the supposed missing unknown man whose bones were supposed to have been found. This charge was argumentative; and what we complain of mostly is that the court's argument was against the defendant, showing how that even if the government witnesses were mistaken as to when they claimed to have seen the men together, yet the defendant could have murdered the man. We contend that the court, instead of arguing to the jury that the witnesses for the government were right (as he in effect does in his charge to the jury), should rather have cautioned the jury not to hastily attach too great a credence to the testimony of the witnesses. The Waters, who though they saw two men often for a week or more, yet did not even learn their names.

Mr. Harris, in his work on *Identification*, *section* 3, says: "This branch of our subject, simple as it may seem, and free from difficulty in the estimation of those unaccustomed to reasoning on the topic, is on the contrary, perhaps, one of the most difficult questions with which courts and juries are called upon to deal with. The change in the appearance of the person whose identity is in question wrought by age, mode of life, hardships, toil and care, sometimes coupled with a skill of dis-

guise; again, the want of perception and discrimination in the witnesses, these and numerous other causes have led to numerous cases of mistaken identity, as we should see in both civil and criminal causes. Sometimes position and estate are acquired by fraud, and again, the innocent is punished, and not unfrequently the guilty escapes from a mistake in the personal identity. These questions are fraught with dangerous consequences, and difficult with their solution, and are of the greatest importance in the affairs of men. But where is the remedy? It lies alone in *caution* and *prudence*. Observation and sad experience admonish courts and juries to the use of the utmost care, caution and prudence."

The celebrated Techborne case is an illustration of the importance of the rule laid down by Mr. Harris.

Rice's Cr. Ev., section 304, *page* 486.
3 *Gr. Ev., section* 30.
Wills' Cir. Ev., Ch., 47.
Nichols vs. People, 17 *N. Y.*, 114.
McCarny vs. People, 83 *N. Y.*, 408.
1 *Taylor's Ev., sections* 554 *and* 555.

The fifth and sixth assignment of errors are to the error in the court's charge to the jury on the subject of *alibi*. In these two charges, or objections to the charge, the court tells the jury that evidence of *alibi* "is always competent to go to a jury, but it is evidence that is to be viewed with a great deal of *scrutiny* for the reason given by the law." Again, in the sixth

assignment, the court told the jury: "Because a defense of this kind can, with comparative ease, be made effective by means of fraud, perjury and falsehood, and the ease with which a defense of this kind can be fabricated, the proof offered to sustain an *alibi* must be *submitted* by you to a *rigid scrutiny* in considering the *strength* of evidence necessary to sustain the defense of an *alibi*." Now we contend that this is not the law.

In *Albin vs. State*, 63 *Ind.*, 598, it is said: "We know of no rule of law which attaches a suspicion to, or fixes a blemish upon, evidence tending to prove an *alibi* any more than it does upon evidence tending to prove any other fact."

In *People vs. Lattimore*, 86 *Col.*, 403, the court said: "The defense of *alibi* is not one requiring that the evidence given in support of it should be scrutinized otherwise or differently from that given in support of any other issue in the cause."

"Where the defendant relies upon the defense of an *alibi* it is error for the court to *discredit* such defense by charging the jury that evidence thereof should be weighed with great caution, because it is a defense easily fabricated and often attempted by contrivance or perjury, even though the instructions declared that such defense, when established by evidence, is a good and complete legal defense. Such defense should be treated as any other, and not disparaged or prejudiced in the court's instructions to the jury."

Dawson vs. State, 62 *Mich.*. 241.
People vs. Ah. Sing, 64 *Cal.*, 253.
People vs. Pearsall, 50 *Mich.*, 233.

See brief of counsel for Pff.
Lewis vs. U. S. 146 U. S. 370.

In 1 *Am. and Eng. Ency. Law, page* 455, we find the following stated as the law: "An *alibi* is as much a traverse of the crime charged as any other defense, and proof tending to establish it, though not clear, may, with other facts of the case, raise a reasonable doubt of the guilt of the accused. When the evidence is so imperfect as not to satisfy the jury they will not find the fact."

"Where the prosecution rests upon positive and undoubted proof of the prisoner's guilt (which is not so in the case at bar), it should not be overcome by less than full, clean and satisfactory evidence of the alleged *alibi*. But the evidence tending to establish an *alibi*, though not of itself sufficient to work an acquittal, shall not be excluded from the case, for the burden of proof never shifts, but rests upon the prosecution throughout upon all the evidence given in the cause taken together to convince the jury, beyond a reasonable doubt, of the prisoner's guilt."

Watson vs. Cone, 95 *Pa. St.*, 418.

The court should have told the jury, although not a word of it was mentioned in the charge, that, "although the evidence may fall short of establishing the plea of *alibi* as such, yet it may be considered by the jury with the entire evidence in determining whether a reasonable doubt of the defendant's guilt has been raised."

Ware vs. State, 67 *Ga.*, 349.
People vs. Fong Ah. Sing, 64 *Cal.*, 253.
Watson vs. Cone, 95 *Pa.*, 418.

Blankenship vs. State, 55 *Ark.*, 244.
McLain vs. State, 18 *Neb.*, 154.
Miller vs. People, 39 *Ill.*, 457.

In the seventh assignment the court told the jury that they should look to the character of the defendant's witnesses. Why tell them to look to the character of the defendant's witnesses. We do not think this charge was fair to the defendant, and think that it had the effect to disparage both the defendant's plea of *alibi* and the credibility of his witnesses.

Galey vs. State, 85 *Ala.*, 333.

In the eighth assignment of error the court told the jury that: "If it is true in this case that he (defendant) could have shown by his father-in-law, or by his brother-in-law, or by any other witnesses, a state of case that would have the effect of destroying this evidence offered as accusatory evidence upon the part of the government, and, if he does not avail himself of that means, then you are to take it in the light given you by the law I have just read, so far against him as you think from all the circumstances such a presumption is entitled to in the light of that condition which confronts him." The vice of this charge is in this: neither the record or evidence any where shows that defendant could have proven anything by his father-in-law, or brother-in-law, or any other witness, as to his whereabouts, except the witness he did produce, unless it may have been his wife, who could not have been a witness.

The judge in the charge to the jury must not assume the existence of facts not in the evidence or which there is no evidence tending to prove.

11 *Am. and Eng. Ency. Law, page* 254.

As to the tenth, eleventh and twelfth assignment of errors we observe that the same idea runs all the way through the court's charge as being argumentative and disparaging to the defense of an *alibi* and to the credibility of the defendant's witnesses.

In the twelfth assignment of error the court said this to the jury: "There is a conflict between the proposition that he (defendant) was at or near the tunnel at one time and date that he was in the Indian country at said time, or may have been there. The government witnesses say that he was there. The witnesses, who were introduced on the other side, say that they missed him from up in that section of the country. The evidence given as coming from the government's witnesses as to the declaration of the *men* as to where they had been and where they had come from, and where the deceased had found this defendant, shows that he brought him from that section of the country." We quote this to show that the evidence does not sustain the learned court. The witnesses do not say that they missed the defendant from near the tunnel till long after the dead man was found. But, on the contrary, the witnesses say defendant was up in the state of Arkansas in the months of January, February and March, both before, during and after the Waters saw these men in the Indian country. So, we suppose,

that the court must have got his idea of this part of the evidence from the argument of the district attorney. And we quote this part of the charge for another purpose, to show that the learned court got his idea of "where the deceased found this defendant, etc.," from what George Waters said that the missing man told him (Record pages 24 to 37). Now what Waters said in this connection was not competent, and, whether it was or not, we contend that the court ought not to have singled out and emphasized it to the jury to the disparagement of the defendant. He could with equal propriety have singled out another fact in all the Waters' testimony, that the men were at his place for a week or more, worked for him, talked with them, and yet not one of them ever even learned the name of a single one of those people. Yet after the lapse of three years this untutored Indian undertakes to give conversations with the men had three years before. Why not emphasize this fact?

The error complained of in the thirteenth assignment is that the verdict ought not to have been received by the court because the juror, Brown, hesitated to say that it was his verdict. The jury should have been sent back to further consider the case.

Ru hbauer vs. State, 22 *Wis.*, 468.

The many errors considered we are constrained to the belief that the judgment should be reversed, the verdict set aside, and the defendant granted a new trial.

Respectfully submitted,

A. H. GARLAND,

Attorney for Plaintiff in Error.

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CASE NO. 15173.

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

JOHN GRAVES, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
No. 838.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

BRIEF FOR DEFENDANT IN ERROR.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

BRIEF FOR DEFENDANT IN ERROR.

Plaintiff in error was convicted for murder of an unknown white man, on February 13, 1889, near Illinois Station, in the Indian Territory.

The record contains no exceptions upon rulings as to evidence or upon requests to charge. The assignments of error relate entirely to proceedings after the close of the testimony.

STATEMENT OF FACTS.

The evidence was entirely circumstantial. The remains of deceased were found about May 1, 1889, the body having been buried at some distance from the road, and

subsequently pulled out and partly eaten by animals. The skull showed that it had been crushed with some weapon.

The case of the prosecution was substantially as follows: Two men stopped together at Vian, in the Territory, about February 1, 1889, and worked a few days making rails. They came last from Winslow (pp. 37, 72), in Arkansas. One of them was accompanied by his wife and two small children. They came in a carriage with a pair of bay horses on their way to Oklahoma, and their stay at Vian was for the purpose of earning provision for themselves and their horses. Their personalities were remembered although their names were forgotten, except that a boy remembered the name of one of them to have been John Graves (pp. 59, 61). The party then started again on its journey, and was next seen camping near the scene of the murder. This was on the evening of February 13. The following day the party was again seen driving along, but one of the men was missing. The missing man was identified with the body found so long afterwards, mainly by peculiarities of the teeth and clothing. He was the man who had claimed to own the wagon and horses (pp. 26, 40, 69, 72, 73, 74). The prosecution's witnesses recognized the defendant, John Graves, as the other man, though to most of them his name had been unknown. The wife of defendant was admitted to be in town at the time of the trial, but did not appear in the court room. She was seen by one of the witnesses for the prosecution outside the court room, and believed by the witness to be the woman who was with the party (p. 45).

The defense was an *alibi*. Various witnesses swore that defendant at the time of the murder was at Winslow, Ark.; that he was working there for his brother-in-law, one Connelley, for a considerable time, both before and after February 13; that Mr. Morgan, defendant's father-in-law, lived near Connelley. Neither Morgan nor Connelley was produced as a witness, nor was any explanation given of the absence of either, except the statement by one witness that, according to his "understanding," Connelley was not friendly to the prisoner. Yet Morgan, the father-in-law, was in town at the time of the trial and Connelley not far off (p. 130). Defendant himself did not take the stand. Although defendant is stated to have been staying with Connelley while in Winslow, no member of the latter's household was produced at the trial, but merely persons who claimed to have seen defendant occasionally.

The scene of the homicide was in the Cherokee Nation about 40 miles (p. 30) from Fort Smith, where the case was tried, and near a railroad (pp. 6, 7). Winslow, the scene of the *alibi*, was also 40 miles from Fort Smith, and on a railroad (p. 99). February 13 was identified as the date of the murder by the prosecution's main witness, Barnes, by the fact that he had a note payable that day at Salisaw, and was on his way back when he found the party camping near the place where the body was afterward found (pp. 47, 48). Many other witnesses fixed the date of their stay at Vian in that month, and one by his books of account identified February 7 positively as one of the days when they were there (p. 25). On the other hand, clerks in a store at Winslow testified that their

book entries showed goods sold to defendant on January 24, February 9, 11, 16, and 20 (pp. 94, 95, 104). Another witness claimed to show by a book entry that defendant was at Chester (on the same railroad between Winslow and Fort Smith) looking for a job on February 12 (p. 118). His other witnesses put him in that neighborhood from January to March.

ARGUMENT.

The assignments of error in this case are nearly all directed to the charge of the court, and this affords perhaps the most extreme illustration of any of the cases now before the court from the Indian Territory of the way in which such exceptions ought not to be drawn. Almost every passage excepted to is very long, containing a variety of different propositions. In the middle of one such passage is even found a total change of subject. Especially in view of the portions of the charge not excepted to it is almost impossible to guess what claim of error the prisoner's counsel intended to maintain. There was no excuse whatever for counsel's action in this regard. He had ample time to draw most careful exceptions to the original charge, for the jury retired at 3:45 p. m. on that day and came back again for further instructions at 9:15 the following morning (p. 156), on which occasion the court would doubtless have allowed any exceptions to be presented. The charge seems to have been in writing and to have been submitted to defendant's counsel in writing at the time of delivery, for the report of the occurrences at the trial shows defendant "at the time" to have excepted to these long passages

verbatim. Neither the exceptions nor the assignments of error point out the reasons of objection.

The exceptions in this case seem to have been prepared on the model of those discussed by Mr. Justice Clifford in *First Unitarian Society* v. *Faulkner* (91 U. S., 415, 423), as follows:

> Two or three passages of the charge, it must be admitted, are quite indefinite, and somewhat obscure; but they are not more so than the exceptions of the defendants, which are addressed to nearly a page of the remarks of the judge, without any attempt to specify any particular paragraph or passage as the subject of complaint; nor does the assignment of errors have much tendency to remove the ambiguity.
>
> Instructions given by the court to the jury are entitled to a reasonable interpretation, and they are not, as a general rule, to be regarded as the subject of error on account of omissions not pointed out by the excepting party. (*Castle* v. *Bullard*, 23 How., 189.)
>
> Even now, though the complaining party has filed an assignment of errors and submitted a written argument, it is by no means certain what the precise complaint is.

An exception taken wholesale to a series of propositions in a charge is unavailable if any one of the propositions is correct. (*Johnston* v. *Jones*, 1 Black, 209, 220; *Rogers* v. *The Marshal*, 1 Wall., 644, 654; *Beaver* v. *Taylor*, 93 U. S., 46, 54; *Railroad Co.* v. *Varnell*, 98 U. S., 479, 483; *Mobile R. R. Co.* v. *Jurey*, 111 U. S., 584, 596.) The principle is the same as when the whole charge is excepted to, as in *Lincoln* v. *Claflin*, 7 Wall., 132, 139; *Lucas* v. *Brooks*, 18 Wall., 436, 456; *Cooper* v. *Schlesin-*

ger, 111 U. S., 148; *Van Stone* v. *Stillwell Co.*, 142 U. S., 128, 135; *Chateaugay Co.* v. *Blake*, 144 U. S., 476, 488, or when the refusal of a request containing several propositions is excepted to wholesale, as in *Harrey* v. *Tyler*, 2 Wall., 328, 339; *Indianapolis R. R.* v. *Horst*, 93 U. S., 291, 295; *United States* v. *Hough*, 103 U. S., 71; *Moulor* v. *American Life Ins. Co.*, 111 U. S., 333, 337, 338. When the charge is ambiguous additional instructions should be asked. (*Pennock* v. *Dialogue*, 2 Pet., 1, 15; *Improvement Co.* v. *Mason*, 14 Wall., 442; *Spring Co.* v. *Edgar*, 99 U. S., 645, 659.)

The reason for the rule is clearly stated by Mr. Justice Miller in *Harrey* v. *Tyler*, 2 Wall., 328, 339, as follows:

> However it might pain us to see injustice perpetuated by a judgment which we are precluded from reviewing by the absence of proper exceptions to the action of the court below, justice itself, and fairness to the court which makes the rulings complained of, require that the attention of that court shall be specifically called to the precise point to which exception is taken that it may have an opportunity to reconsider the matter and remove the ground of exception. This opportunity is not given when pages of instructions are asked in one prayer, and if refused as a whole are excepted to as a whole. We may rightfully expect of counsel who prepare cases for this court that they shall pay some attention to the rules which we have framed for their guidance in that preparation, as well as to those principles of law referred to, which are necessary to prevent the prayer that counsel has a right to make to the court for laying down the law to the jury, from being used as a snare to the court and an instrument for perverting justice.

In *Carver* v. *Astor* (4 Pet., 1,. 81) Mr. Justice Story said:

> If, indeed, in the summing up the court should misstate the law, that would justly furnish a ground for an exception. But the exception should be strictly confined to that misstatement, and by being made known at the moment would often enable the court to correct an erroneous expression, or to explain or qualify it in such a manner as to make it wholly unexceptionable or perfectly distinct.

It may be that in a criminal, especially a capital, case the Attorney-General has the power to waive technical objections to the form of an exception. But such a power should hardly be exercised in such a clear case of guilt as this.

FIRST.

The first assignment of error is to the argument of counsel (p. 130):

> The court permitted the district attorney, in his closing argument to the jury, to comment on the absence of the defendant's wife from the presence of the court, stating, among other things, that the defendant's wife ought to have been sitting by the side of her husband during the trial, so that the witnesses for the Government could see her and identify her as the woman who was said to have been with the defendant in the Indian country before the unknown man's remains or bones were found, and other like arguments, statements, and declarations.
>
> To which statements to the jury the defendant at the time objected, which objections were by the court overruled, to which ruling of the court the defendant at the time excepted.

It will be remembered that the wife of defendant was not a competent witness for or against her husband. The statute making the prisoner a competent witness in his own favor (act of March 16, 1878, c. 37) does not include his wife; nor is she a competent witness for her husband in criminal cases in the Federal courts except in prosecutions for bigamy, polygamy, and unlawful cohabitation. (Act of March 3, 1887, c. 397.) Acts making parties competent witnesses in their own behalf do not include their wives. (*Lucas* v. *Brooks*, 18 Wall., 436, 453.)

The district attorney's remarks, therefore, had no reference to any omission to produce relevant testimony.

Evidently, one of the main issues in this trial was that of identification of the prisoner. He had somewhat altered his appearance, but many witnesses who had seen the companion of the murdered man three years before were confident that they recognized him in the prisoner at the bar. Most of those witnesses had seen not only the prisoner, but his wife. It would have been almost decisive on the question of identification one way or the other if the wife had been in the court room so that she could be scrutinized. When it appeared that the wife was in town through the trial but not brought to the court room the fact must have impressed the jury. It is the almost invariable custom, when practicable, on the trial of married men to have their wives present with them in court to give their husbands their moral support and appeal to the sympathies of the jury. Nothing could have struck the jury more forcibly than the continued and unexplained absence of the defendant's wife in this case,

although so near at hand. The district attorney's remarks related to a perfectly proper inference, not discountenanced by any rule of statutory or common law, and it is clear that if the remark had been improper it could not have prejudiced the prisoner.

As to whether, had the wife been a competent witness, her absence from the witness stand could have been commented on by the district attorney is a question about which the courts are in conflict. (*People* v. *Hovey*, 92 N. Y., 554, 559; *Mercur* v. *State*, 17 Tex. App., 452, 467; *Johnson* v. *The State*, 63 Miss., 313.)

Defendant complains that the court should have instructed the jury that the wife was not a competent witness. It was his counsel's duty to ask such instruction, if he desired it, under the authorities already cited.

SECOND AND THIRD.

These assignments of error relate to passages from the charge at pages 147 and 148, relating to proof of motive. The court said in the former paragraph:

> If you are able to find that he had a motive for this act, it is your duty to find it. But it is not necessary that you should find it to enable you to find either the existence of malice aforethought or that he was the party who committed that act.

And in the latter paragraph:

> Not that it is necessary to prove the motive, because in the language of the law I have already substantially given to you, it is frequently so hidden in the mind and breast of the party who commits the crime that we are unable to drag it to the light of day.

And:

> It is not necessary to find the existence of motive. If you do find it, it simply becomes that much more evidence in the case. If we find an act done by a particular party, and under such circumstances as to show that it was done willfully and with premeditation, that there was a formed design to do the act, to produce the result, it matters not if there was no motive existing or that can be found. There always is a motive; you can not always find it, however.

The above are mere extracts from lengthy passages, followed by wholesale exceptions.

The point which these exceptions apparently were intended to raise was that it was improper to charge the jury that they could convict without ascertaining the precise motive of the homicide. This is not the law. (*McLain* v. *Commonwealth*, 99 Pa. St., 86, 99; *Clifton* v. *State*, 73 Ala., 473; *Hornsby* v. *State*, 94 Ala., 55, 67; *Green* v. *State*, 38 Ark., 304; *People* v. *Minisci*, 12 N. Y. St. Rep., 719; 2 Bishop Crim. Law, §680; 1 Bishop Crim. Proc., §1107; 1 Greenleaf on Evidence, §34; 3 *id*, §44.)

In *People* v. *Bennett* (49 N. Y., 137, 148) relied on by plaintiff in error, the conviction was reversed, two judges dissenting, because the court charged that the jury might imagine a certain specified motive which there was no evidence tending to indicate, in order to bring the case within a certain statutory degree of manslaughter.

But the court's remarks in the case at bar were entirely unnecessary and innocuous, because motive was clearly shown. It was testified by several witnesses that the mur-

dered man claimed to own the horses and hack in which the party were driving, and the possession of such property appears to be quite sufficient reason for homicide in the Indian Territory.

There are also propositions included in each of the passages generally excepted to, about whose correctness no possible question could ever have been raised.

Counsel in the brief for plaintiff in error here inserts a suggestion that the *corpus delicti* is not proved—that the body found is not shown to be that of a man who had been killed. No such suggestion was made at the trial at this point or elsewhere. But the skull of the deceased was broken. It was exhibited to the jury, and the court, without objection, left it to them to decide whether the injury was caused by such a weapon as that described in the indictment.

FOURTH, FIFTH, AND SIXTH.

These assignments of error relate to passages in the charge concerning the defense of *alibi*. Whatever was said by the court in the paragraphs excepted to must be held to have had no bearing on the verdict, because on the following day the jury came into court and made the following request through the foreman:

> We would like to be reinstructed in regard the defense of *alibi*, and the importance to be put in dates as to both for the defense and the prosecution (p. 156).

The court then charged on the subject of *alibi* to the extent of four pages, restating the whole argument, and

covering again every point; the jury were doubtless guided entirely by the reinstructions.

All of these assignments of error, however, cover passages about whose correctness there can be no question. We cite, for instance, the following passages:

> *Fourth.* All of the Government's evidence that is offered in the case that is accusatory, that tends to show his identification, that he was associated with the missing man, that he was seen with him, putting him in a position where he may have had an opportunity to have disposed of him by death, is in contradiction to this testimony that is offered to show that he did not have an opportunity.
>
> *Fifth.* That is the point that is at issue—the time when the party was killed and whether or not this defendant was the party who committed that act.
>
> *Sixth.* You are to look at all the facts and circumstances that may be offered as identifying the defendant, whether they offer you facts and circumstances outside of their positive identification of him, because that is positive evidence, the fact that they saw him, and that upon the stand they recognize him as the same person they saw, by his appearance, by his countenance, by his eyes, by the general shape of his person, and all these facts, and whether or not there are any other extraneous facts in the shape of the identity of his family with the family that they saw. These are facts that go to corroborate his identity as testified to by these witnesses.

It will be noticed that the sixth assignment of error does not correctly state the charge, which is to be found at pages 151, 152 and pages 162, 163 of the record. The brief of plaintiff in error at pages 7 to 9 copies from the assignment of error instead of from the charge itself.

The *fourth* assignment of error is based in the brief for plaintiff in error on the argumentative character of the charge. If a charge is too argumentative, that is legitimate subject for criticism in any court which has general power to grant a new trial and is not confined to assignable errors. It is also a legitimate ground for exception to a charge that it argues upon the facts in jurisdictions where the court, by Constitution, statute, or otherwise, has restricted powers and can instruct only upon questions of law. In this court it is respectfully submitted that there is no ground of exception to an argumentative charge except when the court undertakes to state propositions of law binding upon the jury and states them incorrectly.

The *fifth* and *sixth* assignments are based on the court's instructions that the testimony relating to *alibi* is to be subjected to particular scrutiny. The passages criticised are as follows:

> *Fifth.* Now this evidence that is offered as *alibi* testimony is evidence that is always competent to go to a jury, but *it is evidence that is to be viewed with a great deal of scrutiny for the reason given by the law.* If it is credible, if it appears to be a state of case that made it physically impossible for that party to have been with the missing man at the time of the killing, it is effective in the law and one of the most effective defenses that can be offered; but if it is not credible, either because it is forged willfully or because of an honest mistake, then it ceases to be effective, although the evidence supporting it may be truthful, the facts may be credible.
>
> *Sixth.* The law says that this defense is of all others the most decisive when duly substantiated or established, yet it is the easiest defense to fabricate

> and the most difficult to be disproved. * * * A witness must be able to give a set of circumstances which may have occurred, which may be true in every respect, and the falsehood may be only in applying them, either purposely or by mistake, to a different time or date or hour than that in which they occurred; and if this is done by mistake, it constitutes a failure of the facts as proving facts, and if it is done willfully, it is a contrivance by which pleas of *alibi* are made very difficult to disprove and so easy to fabricate; because this is true, and because of the liability of witnesses to honestly mistake as to the time or date when things occur, and because it is so easy to fabricate a defense of this kind, a defense of that nature is often resorted to and is often attempted to be sustained and made effective by fraud, subordination, and perjury. Because a defense of this kind can, with comparative ease, be made effective by means of fraud, perjury, and falsehood, and the ease with which defenses of this kind can be fabricated, *the proof offered to sustain an alibi must be submitted by you to a rigid scrutiny.* In considering the strength of evidence necessary to sustain the defense of *alibi* it is obvious that all the testimony tending to show that the accused was in another place at the time of the killing of the unknown man is in direct conflict with the evidence with that which tends to prove that he was at the place where the crime was committed, at the time the crime was committed, and actually assisted in its commission.

It is true that in many or most of the American States the italicized passages, if separately excepted to, would constitute ground for reversal. For in these States, by constitutional provision, statute or otherwise, the courts are not allowed to discuss questions of fact in instructing

the jury. It is needless to say that the rule in the Federal courts, as in the courts of England and some of the States, is to the contrary. (2 Thompson on Trials, §§ 2280–2294.)

It is unquestionably true that evidence to prove *alibi* is easy to fabricate. It is equally true that it is difficult to disprove. It is equally true that it is easily and often made effective by means of fraud, perjury, and falsehood. For these reasons the evidence has always been looked at with particular scrutiny. That it requires particular scrutiny, although just as good as any other evidence, is a familiar rule, but it is a rule of fact and not a rule of law. Whether, therefore, it can be stated to the jury depends upon the general question whether the court is authorized to discuss questions of fact. The extent to which cautionary instructions as to questions of fact are considered proper varies even in jurisdictions where the doctrine of the Federal courts prevails upon this general question. It is believed, however, that no court goes beyond this court in confiding such subjects to the discretion of the trial judge.

In *Provo* v. *The State* (55 Ala., 222), the appellate court sustained the following charge: "That the jury should consider the evidence of *alibi* with great caution; that the law so considered it, for the reason that it was so easily manufactured; but that an *alibi*, when once established to the satisfaction of the jury, was as good as any other defense."

Part of the instructions objected to in the case at bar are substantially quoted from the celebrated charge of Chief Justice Shaw in *Commonwealth* v. *Webster*, 5 Cush.,

295, 319 (a charge in which Justices Wilde, Dewey, and Metcalf, sitting with him on the trial, concurred):

> Of this character is the defense usually called an *alibi;* that is, that the accused was elsewhere at the time the offense is alleged to have been committed. If this is true—it being impossible that the accused should be in two places at the same time—it is a fact inconsistent with that sought to be proved, and excludes its possibility. This is a defense often attempted by contrivance, subornation, and perjury. The proof, therefore, offered to sustain it, is to be subjected to a rigid scrutiny, because, without attempting to control or rebut the evidence of facts sustaining the charge, it attempts to prove affirmatively another fact wholly inconsistent with it; and this defense is equally available, if satisfactorily established, to avoid the force of positive as of circumstantial evidence. In considering the strength of the evidence necessary to sustain this defense, it is obvious that all testimony, tending to show that the accused was in another place at the time of the offense, is in direct conflict with that which tends to prove that he was at the place where the crime was committed, and actually committed it. In this conflict of evidence, whatever tends to support the one tends in the same degree to rebut and overthrow the other; and it is for the jury to decide where the truth lies.

Judge Thompson (2 Thompson on Trials, §§ 2433, 2434), after laying down a general rule that the defense of *alibi* is not to be disparaged, adds: "But the above rule applies only in those courts where the judge is prohibited from commenting upon the weight of the evidence."

In *Provo* v. *The State, supra*, this form of charge is distinguished from charges to the effect that the jury should look on the testimony with suspicion. (*Spencer* v. *State*, 50 Ala., 124.)

Counsel for plaintiff in error also complain under this head that the court should have charged the jury more fully as to the effect of *alibi* evidence.

> The court should have told the jury, although not a word of it was mentioned in the charge, that "although the evidence may fall short of establishing the plea of *alibi* as such, yet it may be considered by the jury with the entire evidence in determining whether a reasonable doubt of the defendant's guilt has been raised."

If specific instructions had been asked upon this point, and the instructions had been denied, it might have been a serious question whether the conviction would stand.

The question is not, indeed, regarded as free from doubt, although the weight of recent authority is in favor of the position stated upon the brief of plaintiff in error.

It was held that *alibi* is a defense which must be established by a preponderance of evidence in *State* v. *Hamilton*, 57 Iowa, 596; *State* v. *Reed*, 62 Iowa, 40; *Pellum* v. *State*, 89 Ala., 28; *Thompson* v. *Comm.*, 88 Va., 45; *Garrity* v. *People*, 107 Ill., 162; *People* v. *Lee Sare Bo*, 72 Cal., 623. In the Iowa cases two judges vigorously dissented. The contrary ruling was made in *Pollard* v. *State*, 53 Miss., 410; *Landis* v. *State*, 70 Ga., 651; *Walters* v. *State*, 39 Oh. St., 215; *Turner* v. *Comm.*, 86 Pa.

St., 54, 73–74; *Watson* v. *Comm.*, 95 Pa. St., 418; *Rudy* v. *Comm.*, 128 Pa. St., 500; *French* v. *State*, 12 Ind., 670; *State* v. *Howell*, 100 Mo., 628, 661, 663; *State* v. *Josey*, 64 N. C., 56; *Davis* v. *State*, 5 Baxt. (Tenn.), 612; *Ackerson* v. *People*, 124 Ill., 563; *Aneals* v. *People*, 134 Ill., 416; *People* v. *Fong Ah Sing*, 64 Cal., 253; *People* v. *Tarm Poi*, 86 Cal., 225; *Adams* v. *State*, 28 Fla., 511; *Murphy* v. *State* (Fla.), 12 Southern Rep., 453; *Walker* v. *State*, 42 Tex., 360, 371; *People* v. *Stone*, 117 N. Y., 480; *State* v. *Ward*, 61 Vt., 153, 192; *Blankenship* v. *State*, 55 Ark., 244, 248. The Pollard and Landis cases above cited contain full discussions by the court. The latter line of decisions are approved in Wharton's Crim. Ev., § 333; Abbott Tri. Brief Crim. Causes, p. 439; 1 Bishop Crim. Proc., §1066. Judge Thompson (2 Thompson on Trials, § 2435–2440) sets out both views, holding that the former "has gained considerable foothold and is possibly the prevailing view;" calling *alibi* a defense and deducing the proposition that the burden of establishing it is on the defendant; adding, however:

> But upon the most unshaken grounds his burden is sustained, and an adequate *quantum* of proof produced by the defendant when he succeeds in raising a reasonable doubt in the minds of the jurors as to whether or not he was at the place of the crime when it was committed.

The view that *alibi* is a defense which must be established by a preponderence of evidence was first formulated, according to Judge Thompson (§ 2437) by Chief Justice Shaw in the famous case of *Commonwealth* v. *Webster* (5

Cush., 296, 323, 324), in whose opinion the following passages occur:

> In the ordinary case of an *alibi*, when a party charged with a crime attempts to prove that he was in another place at the time, all the evidence tending to prove that he committed the offense tends in the same degree to prove that he was at the place when it was committed. *If, therefore, the proof of the alibi does not outweigh the proof that he was at the place when the offense was committed, it is not sufficient.*

It will be noted, however, that this view does not seem to be universally followed in practice in Massachusetts (*Commonwealth* v. *Choate*, 105 Mass., 451, 456, 459), where it seems now to be settled that the burden is always on the prosecution in a criminal case (*Commonwealth* v. *McKie*, 1 Gray, 61). The remarks above quoted from Webster's case are in line with the theory of criminal evidence previously expounded by Chief Justice Shaw in the well-known case of *Commonwealth* v. *York*, 9 Met., 93, 116–117), where he says:

> Proof beyond reasonable doubt is necessary to establish a fact against the accused; but preponderating proof—proof necessary to satisfy a jury of the fact—is sufficient to establish a fact in his favor, but it must go to this extent; otherwise there is nothing on which the jury can found their belief and warrant them in considering the fact proved. It is not sufficient, therefore, to raise a doubt, even though it be a reasonable doubt, of the fact of extenuation, simply because it is no *proof* of the fact.

The courts have similarly differed on the burden of proof of insanity in criminal cases, where, however, the prisoner is confronted with the presumption of sanity, which destroys the analogy. The authorities on this subject are set forth by Mr. Croswell in his notes to the fifteenth edition of Greenleaf on Evidence (1 Greenleaf on Evidence, § 81; 3 *id.* § 5; see also *State* v. *Bartlett*, 43 N. H., 224; Wharton on Criminal Evidence, §§ 336–340.)

If the so-called defence of *alibi* were in truth a defense in confession and avoidance like the plea of *autrefois acquit*, or of pardon, there is no doubt that the defendant would have to establish it by preponderance of evidence (1 Bishop Crim. Proc., § 1048; Wharton on Criminal Evidence, § 332.) But it is difficult to see how an *alibi* can be spoken of as an affirmative defense. It is proof under the plea of not guilty. The prosecution undertakes to prove that the prisoner was in a certain place at a certain time. An *alibi* takes issue upon this allegation. "To hold that the prisoner is a defendant makes an *alibi* a defense in the nature of a plea of confession and avoidance in a civil suit, whereas it was not a defense at all in any other sense than as rebutting evidence." (*Walker* v. *State*, 42 Tex., 360, 371).

If the above position is correct, then the alibi testimony is but an integral part of a mass of evidence bearing upon an issue of which the Government holds the affirmative under the general rules laid down by the court in *Commonwealth* v. *McKie*, 1 Gray, 61, cited and approved in *Chaffee* v. *United States*, 18 Wall., 516, 545, and *Lilienthal's Tobacco* v. *United States*, 97 U. S., 237, 266, and to which, outside of Massachusetts (1 Gray, at p. 65),

homicide cases are no exception. In the Lilienthal case Mr. Justice Clifford said:

> In criminal cases the true rule is that the burden of proof never shifts; that in all cases before a conviction can be had, the jury must be satisfied from the evidence, beyond a reasonable doubt, of the affirmative of the issue presented in the accusation that the defendant is guilty, in the manner and form as charged in the indictment.

No exception, however, raises the point in the case at bar; and while the court uses some expressions in the charge which incline toward the more restrictive theory of alibi, it is by no means clear what would have been the result of a proper request for instructions on the point. The defense was so thoroughly discredited in this case, by failure to produce the best evidence, that no injustice will be done by applying the well-settled rules of practice.

SEVENTH.

This assignment of error (pp. 152, 153) relates in part to the defense of *alibi* and in part to the argument based on defendant's failure to produce certain witnesses, both of which matters are discussed elsewhere.

In this passage, as in the others, there are plenty of unquestionably correct propositions, such as that—

> You are to look at the character of these witnesses; whether they are intelligent; whether they are reasonable, etc. Whether or not there is anything in their statements suspicious, such as the failure to produce original record books or original entries—facts of that kind. You are to see what the nature of that *alibi* is; whether it is true or not, and if true, even

> then if it is consistent or not with the theory that at the time of the killing he was in the Indian country at the place of the killing, and that he therefore took part or committed this crime.

EIGHTH AND NINTH.

These assignments of error relate to passages (pp. 153, 154) from that portion of the charge relating to the failure of defendant to produce his father-in-law or brother-in-law as witnesses. It will be remembered that the *alibi* set up was located at the house of defendant's brother-in-law and very near the house of his father-in-law; while the witnesses were all neighbors who saw him only occasionally, and no person from either of these houses was produced. It further appeared not only that his brother-in-law was in the neighborhood, but that his father-in-law was actually in town during the trial. In discussing that omission, the court was careful to state to the jury that "You have no right to make any inferences against him at all, because of his failure to go upon the stand" (p. 154).

In *State* v. *Grebe* (17 Kansas, 458) the court charged that—

> Where evidence, which would rebut or explain certain facts and circumstances of a grave and suspicious nature, is peculiarly within the defendant's knowledge and reach, and he makes no effort to procure that testimony, the jury may very properly take such fact into consideration in determining the prisoner's guilt or innocence. But no inference of guilt is to be drawn from the omission of the defendant and his wife to testify.

The Supreme Court, speaking by Mr. Justice Brewer, affirmed the conviction. (See also to the same effect *People* v. *Grimshaw*, 33 Hun, 505, 510, and cases cited; *People* v. *Hovey*, 92 N. Y., 554, 559, 560; *Commonwealth* v. *Costley*, 118 Mass., 1, 27, and cases cited by Gray, C. J.; 2 Thompson on Trials, §§ 2452–53, and cases cited.)

TENTH, ELEVENTH, AND TWELFTH.

These passages are objected to "as being argumentative and disparaging to the defense of an *alibi* and to the credibility of defendant's witnesses." These points we have already considered under the fourth, fifth and sixth assignments of error.

All of these assignments contain passages whose correctness is not even disputed by defendant, and which, therefore, relieve us, under the authorities already cited, from examining the disputed portions of the instructions.

> *Tenth.* "In considering the strength of evidence necessary to sustain the defense of *alibi*, it is obvious that all the testimony tending to show that the accused was in another place at the time of the killing of the deceased—the missing unknown man—is in direct conflict with that which tends to prove that he was in the place where the crime was committed, at the time it was committed, and actually assisted in its commission."
>
> *Eleventh.* "You are to look at the evidence, the testimony; look to the statements of these witnesses going to the identity of the defendant; their recognition of him from his appearance, etc. * * * If these witnesses identify him in such a way as to satisfy you beyond a reasonable doubt of the fact, they

would put him in a position where they would give him an opportunity, by reason of his being with this missing man, to have committed this crime."

Twelfth. "In looking at this matter of dates, you are to take into consideration the fact that the dates, as entered upon one of the books offered in evidence, is not the original entry, but only a copy of it, and you are to see whether the witness offering the evidence as to that date has given a good reason why that original entry was not produced that it might be seen by you. You are to take into consideration all of these facts."

THIRTEENTH.

This assignment of error relates to an occurrence during the polling of the jury (p. 166):

> Some time after the giving of the charge to the jury they returned into court with a verdict of guilty of murder, as charged in the within indictment; whereupon the court read said verdict to the jury and asked the foreman if the verdict was their verdict. The foreman responded, "Yes, sir." Said jury was then polled, and the judge read said verdict to each of the jury, and asked each of the jury if the verdict just read in his hearing was his verdict. All of the jury answered promptly, except one juryman, W. P. Brown, who answered, "It may be taken for my verdict." The court then read the verdict again to him and again asked him if the verdict just read in his hearing was his verdict. He then answered, "Yes." Whereupon the court accepted the verdict and discharged the jury.

The court was doubtless correct in saying: "Taking into consideration the manner of Mr. Brown, I think he

intended the first answer as an affirmative response, and his answer was owing to his peculiar wayof expressing it" (pp. 169, 170).

In *Hill* v. *State* (64 Ga., 453) a juror, on being polled, replied to the question, "Is that your verdict?" by saying, "I agreed to it." The question being repeated, he said, "I agreed to it, I suppose." Being repeated the second time, he said, "I suppose it is, if that is the proper answer to your question." The court then said: "You are an intelligent man, Mr. Randall, please answer." The juror answered, "Yes, sir; I agreed to it." The verdict was held properly received, and the juror was not allowed to impeach it by subsequently swearing that he had not agreed to it. The case is cited, with approval, in 2 Thompson on Trials, §2632.

This assignmenat of error is not based upon any exception.

FOURTEENTH AND FIFTEENTH.

Overruling the motion for a new trial and sentencing the defendant are not assignable errors. (See brief in *Hall* v. *United States.*)

It is respectfully submitted that the judgment should be affirmed.

EDWARD B. WHITNEY,
Assistant Attorney-General.